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# MISSOURI DIGEST

COVERING ALL CASES REPORTED IN

MISSOURI REPORTS  
MISSOURI APPEAL REPORTS  
AND  
MISSOURI CASES IN SOUTH WESTERN  
REPORTER

WITH CURRENT CUMULATIVE POCKET SERVICE  
KEEPING THE DIGEST ALWAYS TO DATE



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VOLUME 6  
CARRIERS TO CHARITIES

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# EXPLANATION

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**Each volume of this Digest is complete** from the earliest times and is always down to date. The late Missouri cases are digested and included in the Cumulative Pocket Part in the back of each book.

**The Digest is compiled on the Key-Number plan.** All Key-Numbered section lines in the American Digest Classification are represented in the Digest.

Many of these Key-Numbered section lines have no digest paragraphs, which indicates that the courts of Missouri have decided no cases involving the subject-matter covered by the scope of the Key-Number section lines, but all **Key-Numbered section lines are guideposts** to authorities from other jurisdictions. When authorities from other jurisdictions are desired, examine the same Topic Title and Key-Number section in the Decennials and current Key-Numbered Digests.

**A Descriptive-Word Index**, always complete and down to date, is provided in volume 1 of the Digest. Here are listed alphabetically thousands of words descriptive of the persons, places, or things, questions of fact, and the legal principles involved in the cases digested. The late Missouri cases are also indexed by descriptive word in the Cumulative Pocket Part at the back of the Index volume.

**A Table of Missouri Cases**, alphabetically arranged, is contained in the last volume of the set. It shows the title of the case, the Topic and Key-Number section under which each point is digested, and the volumes and pages of the State Reports, South Western Reporter, and other standard sets of reports where each case is reported. Special effort has been made to show where a case has been passed on by the higher State Court or the United States Supreme Court; also valuable information is included regarding appeals, rehearings, and certiorari.

Titles of memorandum decisions which are related to some other digested case are included in the table. The late cases are listed alphabetically in the Cumulative Pocket Part in the Table volume.





# MISSOURI DIGEST



VOLUME 6



# CARRIERS.

## *Scope-Note.*

**INCLUDES** the regulation and conduct of the business of transportation of goods and passengers by common or private carriers, and matters incidental thereto, such as the operation of palace cars, sleeping cars, etc., freight lines, collection and transportation of money by express companies, etc.; and rights, duties, and liabilities of those engaged in any such business, as to the public and as to individuals, in respect of the persons and property carried.

**For related matters under other topics, see Descriptive-Word Index.**

## *Analysis.*

### **I. Control and Regulation of Common Carriers.**

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14. Exclusive privileges.
15. Connections with and facilities to other carriers.
16. Use of carrier's premises.
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**Consult Pocket Part for later cases. For explanation, see page iii.**

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- 18 (3). Actions to enforce or set aside decisions of officer or board.
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- 118. Negligence of agents or servants.
- 119. Act of God, vis major, or inevitable accident.
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**For related matters under other topics, see Descriptive-Word Index.**



# I. CONTROL AND REGULATION OF COMMON CARRIERS.

## (A) IN GENERAL.

### 1. Power to control and regulate.

*See explanation, page iii.*

### 2. Constitutional and statutory provisions.

Nature of liability as common carrier for loss of or injury to goods, see post, 108.

Who are carriers of passengers, see post, 235.

**Sup. 1891.** Rev. St. 1879, § 598, providing that when a common carrier receives property to be transferred from one place to another, within or without the state, or when it issues receipts or bills of lading in the state, it "shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line such property may pass," and that the carrier issuing the receipt or bill of lading may recover the amount which it may be required to pay the owner of the property from the carrier whose negligence caused the loss or injury, is constitutional.—*Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 15 S.W. 761, 103 Mo. 433; *Nines v. St. Louis, I. M. & S. Ry. Co.*, 18 S.W. 26, 107 Mo. 475.

**Sup. 1903.** Rev. St. 1889, § 2629, forbidding any railroad from charging over any portion of its road a greater compensation than it charges for the transportation of similar quantities of the same class of goods over any other portion of equal distance, which was passed in pursuance of Const. art. 12, § 12, containing much the same language, and requiring the passage of suitable enforcing acts by the Legislature, was not repealed by Rev. St. 1889, § 2637, subsequently enacted, and which forbids railroads from charging a greater aggregate compensation for the transportation of like property "under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction," especially since another section of the latter act (Rev. St. 1889, § 2659) expressly provides that it is not intended to repeal any law in force unless in direct conflict therewith; but both sections may stand together, the former regulating freight charges in any direction over any part of the road, and the latter in the same direction under like circumstances and conditions.—*McGrew v. Missouri Pac. Ry. Co.*, 76 S.W. 995, 177 Mo. 533.

**Sup. 1910.** Act April 1, 1872 (Laws 1872, p. 69), entitled "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this state for the transportation of freight thereon," by section 1 (Rev. St. 1890, § 1126 [Ann. St. 1906, p. 971]) prohibits a railroad company in the state from charging for transportation of property for any distance over its road any larger amount as compensation than is charged by it for the transportation of similar quantities of the same class of property over a greater distance over its road; from charging different rates for receiving, handling, or delivering freight at different points on its road, or any road used by it in connection therewith; and from charging for transportation of property over any portion of its road a greater amount as compensation than is charged by it for transportation of similar quantities of the same class of property over any portion of its road of equal distance. The act was taken substantially from the Illinois law (Laws 1871-72, p. 635). In 1873, the Illinois law was declared unconstitutional on the ground that the Constitution restricted the power of the Legislature to prohibit discriminations to those which were unjust and made the question of the injustice of any alleged discrimination a judicial question for the court, and that the Legislature had no power to declare anything to be an unjust discrimination. The Missouri Constitution of 1865 did not limit the power of the Legislature to prohibit discriminations by railroads, but Const. 1875, art. 12, § 14 (Ann. St. 1906, p. 306), adopted literally from the Illinois Constitution (article 11, § 12), the portion held to have been violated by the Illinois law providing that railroads are public highways, and railroad companies common carriers, and that the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic on the different railroads in the state, and shall pass laws establishing maximum rates and charges for transportation of passengers and freight on the railroads, and enforce all such laws by adequate penalty. The Missouri Constitution, also by article 12, § 12 (page 306), providing that it shall not be lawful for any railroad company to charge for transportation of freight or passengers a greater amount for a less distance than the amount charged for a greater distance, and that suitable laws shall be passed to enforce the provision, adopted the very gist of the statute (the so-called "short-haul" rule) extending its provisions to passengers as well as to freight. *Held*, that

the intent, in adopting section 12 was to establish the short-haul rule as a part of the fundamental law and to put it in operation, and the provision of section 14, directing the Legislature to pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic, does not operate as an implied limitation on the power of the Legislature to prevent only such discriminations as are unjust, the use of the word "unjust" not being intended to limit the Legislature's power in that regard, but to require the exercise of such power, and to declare what shall be unjust discrimination, and such provision refers to discriminations generally, whereas the short-haul rule, established by section 12, applies to a particular class of discriminations, specifically established in positive and explicit terms so that the short-haul provision of Act 1872 was not rendered unconstitutional by the adoption of the Constitution of 1875.—*McGrew v. Missouri Pac. R. Co.*, 132 S.W. 1076, 230 Mo. 496; *Id.*, 166 S.W. 1033, 258 Mo. 23.

Act April 1, 1872 (Laws 1872, p. 69), relating wholly to local discriminations by railroads, contains a short-haul provision, and prohibits a railroad from receiving for transportation of property any greater amount as compensation than is charged for the transportation of the same class of property over a greater distance upon the same road without regard to direction, circumstances, or conditions. Laws Extra Sess. 1887, p. 17, § 4 (Rev. St. 1899, § 1134 [Ann. St. 1906, p. 975]), relating to discriminations under "like circumstances," or "substantially similar circumstances and conditions," embraces a short-haul provision applying to hauls in the same direction under similar circumstances and conditions. The act of 1887 provided that it was not intended to repeal any law then in force, unless in direct conflict therewith, but was intended to be supplemental to such laws. *Held*, that such provision as to repeal furnishes the sole and only test for determining whether the act of 1872 was repealed by the act of 1887, and the two laws merely establishing two systems for preventing discrimination by railroad companies, the later act containing some but not all of the things contained in the system created by the former act and many other things, they are not in direct conflict as to the short-haul clause, and the former act was not repealed by the latter one as to such provision.—*Id.*

That the penalties created by the acts are different, it being necessary in order to enforce the penalty prescribed by the act of

1887 (Laws Extra Sess. 1887, p. 15) for violating its short-haul section, to allege and prove that the shorter and longer hauls were made in the same direction and under similar circumstances and conditions, while such allegations and proof would not be necessary to enforce the penalty prescribed by the act of 1872, and that in a proceeding to enforce the latter penalty it would be no defense to show the facts making defendant liable to the other penalties, does not operate to work a repeal of the former act by the latter one.—*Id.*

**Sup. 1911.** Rev. St. 1899, § 1126 (Ann. St. 1906, p. 971), prohibiting a carrier from charging for transporting goods a larger amount than is charged for the transportation of similar quantities of the same class of goods over a greater distance on the same road, regulates freight charges in any direction on the same road as applied to shipments of the same class property in similar quantities, and is not repealed by sections 1129, 1130, 1133, 1134 (Ann. St. 1906, pp. 973-975), prohibiting a carrier from charging more for transporting a car of freight, than it charges per car for several cars of a like class of freight; prohibiting rebating; making it unlawful for any carrier to give any undue preference to any person in the transportation of goods, and making it unlawful for any carrier to charge any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances, for a shorter than a longer distance over the same line, in the same direction.—*Cohn v. St. Louis, I. M. & S. Ry. Co.*, 133 S.W. 59, 151 Mo. App. 661, transferred from Supreme Court (1910) 131 S.W. 881, 227 Mo. 369.

**Sup. 1912.** The statute requiring the Board of Railroad and Warehouse Commissioners to investigate the reasonableness of rates including switching charges, and imposing penalties for disobedience of its orders, is penal, and must be strictly construed.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 147 S.W. 1052, 243 Mo. 224.

**Sup. 1913.** The provision of Rev. St. 1909, § 3158, that the penalty imposed on a railroad corporation for failure to provide certain facilities for the handling and transportation of freight shall be paid to the good roads fund being violative, Const. art. 11, § 8, providing that all penalties shall belong to the county public school fund, is void.—*State v. St. Louis, I. M. & S. Ry. Co.*, 162 S.W. 144, 253 Mo. 642.

**Sup. 1920.** Rev. St. 1909, § 3184, making it unlawful for a common carrier to subject

any one shipper or consignee to any undue or unreasonable prejudice, though penal in its nature and to be strictly construed, nevertheless must be construed according to its true intent and meaning.—*Alexander v. Chicago, M. & St. P. R. Co.*, 221 S.W. 712, 282 Mo. 236, 11 A. L. R. 867.

Rev. St. 1909, §§ 3184, 3191, providing that a carrier giving any undue preference or subjecting any one person to undue prejudice shall be liable to treble damages and attorney's fees, *held* not unconstitutional.—*Id.*

**Sup. 1924.** A statute authorizing such a body as the Public Service Commission to make a finding on what is purely a claim for damages by a shipper is void whether the finding is to be final or merely prima facie evidence.—*State ex rel. and to use of Missouri Pac. R. Co. v. Public Service Commission*, 259 S.W. 445, 303 Mo. 212.

**Sup. 1923.** Rev. St. 1919, § 9975, inhibiting discrimination in charges or facilities "between transportation companies and individuals," being penal in character, must be strictly construed, and the quoted section cannot be held to apply in cases of discrimination between individuals.—*Tucker v. St. Louis-San Francisco Ry. Co.*, 250 S.W. 390, 298 Mo. 51, affirming judgment (*App.* 1921) 233 S.W. 512.

**Sup. 1928.** Carrier has no constitutional right to same rate of return on all its business.—*State ex rel. and to Use of Pugh v. Public Service Commission*, 10 S.W.(2d) 946.

**App. 1889.** Rev. St. 1879, c. 21, art. 3, provides for classification of railroad freight within the state, and section 834 declares that charges are to be made according to distance, computed from the point where freight is received in the state, notwithstanding it may pass through the hands of several carriers. Section 835 provides that carriers shall not recover more than the charges specified, though more might be reasonable under the common law, and declares that in case of overcharge the party aggrieved shall be entitled to recover three times the amount taken or received from him in excess of the rate prescribed. *Held*, that such act constituted a revision of the whole subject-matter relating to freight charges by common carriers, and liability or common-law remedy against a carrier for overcharges.—*Young v. Kansas City, St. J. & C. B. Ry. Co.*, 33 Mo. App. 509.

### 3. Who are carriers.

See explanation, page iii.

### 4. Who are common carriers.

**Sup. 1920.** Where a buyer of timber who was given a right of way over the lands, constructed a standard gauge railroad and equipped the same with two locomotives, which were used to haul timber products, etc., *held* that though the buyer was an individual, yet he was included within the term "railroad corporation" as defined by Rev. Sts. 1909, § 3214, and hence such railroad became a common carrier under sections 3174, 3179, even though its original business was practically confined to the transportation of timber products, such road continuing to serve the surrounding territory after exhaustion of the timber.—*Idulla Realty & Development Co. v. Norman's Southeastern Ry. Co.*, 219 S.W. 923.

**App. 1876.** Express companies are liable as common carriers.—*Kirby v. Adams Express Co.*, 2 Mo. App. 369.

Wherever the common law prevails, all persons following the occupation of carrying goods for hire by land or water are common carriers.—*Id.*

**App. 1881.** A livery stable keeper while engaged in the gratuitous service of carrying performers to and from an entertainment given for charitable purposes was not a public or common carrier, and consequently the strict care and diligence which the law exacts from public carriers of passengers does not furnish the measure of his liability, but he was, nevertheless, bound to use that degree of care which a prudent man, having due regard for his social obligations, would have bestowed.—*Siegrist v. Arnot*, 10 Mo. App. 197.

**App. 1901.** A railroad, operating a connecting line for another railroad from its station to certain stockyards, which did its business over its own tracks for a distance of half a mile or more, was a common carrier, and held to the same degree of diligence as common carriers in the transportation of passengers.—*Fleming v. Kansas City Suburban Belt R. Co.*, 89 Mo. App. 129.

**App. 1902.** A storage company, employed to move household effects from one house in a city to another, is not a common carrier having a lien on the property moved entitling it to retain it until its charges are paid.—*Thompson v. New York Storage Co.*, 70 S.W. 938, 97 Mo. App. 135.

**App. 1904.** Where defendant corporation, engaged in furniture moving, contracted to move plaintiff's furniture, etc., for a cer-

tain price, and its agent stated that defendant had previously safely moved furniture and bric-a-brac for others, was responsible, and would move plaintiff's furniture with care and deliver it safely, defendant did not thereby assume the responsibility of a common carrier, but was only liable as a bailee for hire for negligence of its servants.—*Jammet v. American Storage & Moving Co.*, 84 S. W. 128, 109 Mo. App. 257.

**App. 1910.** A "common carrier" is one who undertakes for hire to transport the goods of such as choose to employ him, and ordinarily carters and expressmen engaged in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers.—*Collier v. Langan & Taylor Storage & Moving Co.*, 127 S.W. 435, 147 Mo. App. 700.

One holding himself out as engaged in the general business of moving household goods from one residence to another in a city, for all who choose to employ him, is a "common carrier."—*Id.*

**App. 1911.** A drayage and transfer company which carried goods between St. Louis and East St. Louis, transferring them between railroads which had no other connection, receiving compensation out of the freight collected by the final carrier, was a common carrier of goods, and liable as such.—*Model Clothing Co. v. Columbia Transfer Co.*, 139 S.W. 242, 158 Mo. App. 481.

**App. 1915.** If a carrier carries goods as a public employment, undertaking to carry for persons generally, and holds himself out to the public as ready to engage in that business, as a business and not as a casual occupation he comes within the definition of a common carrier.—*Campbell v. A. B. C. Storage & Van Co.*, 174 S.W. 140, 187 Mo. App. 565.

Whether a person is or is not a common carrier *held* a question of fact.—*Id.*

One in fact a common carrier of goods cannot by special contract change his status as such.—*Id.*

**App. 1916.** An express company receiving goods for transportation in the ordinary course of business is *held* to be a "common carrier" and liable as such.—*Tilles v. American Express Co.*, 186 S.W. 1102.

An express company which acts as agent for the owner in arranging for the transportation and storage of goods without having

possession or transporting them as a common carrier is not liable as a common carrier for loss and damage.—*Id.*

**App. 1917.** Where plaintiff corporation owned steamboats used in its own business, and under special contracts with others maintained no ticket or freight offices, and issued no bills of lading, *held* not to be a common carrier, but a mere bailee for hire.—*Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co.*, 191 S.W. 1026.

The test of whether one is a common carrier is whether there is an indiscriminate dealing with the general public, and whether the carrier would be liable for refusing to carry for any one who demanded it.—*Id.*

**App. 1918.** Where express company issued bill of lading, and received carrying charges at St. Louis, acknowledging receipt of carload of agricultural implements for shipment to Mexico, it could not escape liability for nondelivery of part of goods, on theory that it was a mere forwarding agent, actually taking charge of goods at Weehawken.—*John Deere Plow Co. v. American Express Co.*, 203 S.W. 488.

5. Companies, persons, or instrumentalities affected by regulations.  
*See explanation, page iii.*

6. Incorporation and organization of companies.  
*See explanation, page iii.*

7. Franchises and powers.

**Sup. 1917.** The promotion of town building which would result in increased freight and passenger transportation is beyond the legitimate powers of a common carrier.—*Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 194 S.W. 281, 270 Mo. 629, L. R. A. 1918A, 768.

8. Licenses and taxes.  
*See explanation, page iii.*

9. Reports and statements.  
*See explanation, page iii.*

10. Supervision by public officers in general.

**Sup. 1917.** Under Laws 1913, p. 556, authorizing Public Service Commission to require service for the comfort and convenience of passengers, testimony that defendant railway company operated its sleeping car service for 30 years through territory increasing in population sustains an order requiring its restoration for a year, where defendant did

not disclose its entire earnings from the abandoned service.—*State ex rel. Missouri Pac. R. Co. v. Atkinson*, 192 S.W. 86, 289 Mo. 634, L. R. A. 1918A, 46, Ann. Cas. 1917E, 987.

Under Laws 1913, p. 640, § 110, providing that no public utility shall urge grounds not set forth in its application for rehearing before the Public Service Commission, defendant railway company waived the point that its receiver was not joined in proceedings before the commission by not raising the point on rehearing.—*Id.*

**Sup. 1923.** Under the Public Service Commission Law (Rev. St. 1919, c. 95), particularly sections 10412, 10425, 10438, 10439, 10447 (subdivisions 2 and 3), 10448, 10452, 10453, 10455, 10456 (subdivisions 1 and 2), 10460, 10461, 10463, the Public Service Commission had no authority to adopt a rule requiring a railroad to obtain the Commission's permission before withdrawing a passenger train from service.—*Public Service Commission of Missouri v. St. Louis-San Francisco Ry. Co.*, 256 S.W. 226, 301 Mo. 157.

The Public Service Commission, in conducting hearings, does not sit as a legislative committee for the purpose of formulating a public policy and putting it into effect by the issuance of general rules legislative in nature, but is limited to an investigation of specific acts of omission and commission on the part of common carriers.—*Id.*

**Sup. 1924.** Police power is attribute of state's sovereignty, and exercise thereof, subject to constitutional qualification that it shall be never abridged, rests with Legislature, so that power delegated by it to Public Service Commission as to rates and service of railroads and other public utilities is exclusive until revoked by it.—*City of Cape Girardeau v. St. Louis-San Francisco Ry. Co.*, 267 S.W. 601, 305 Mo. 590, 36 A. L. R. 1488.

#### 11. Conduct of business in general.

**Sup. 1886.** An ordinance requiring the street railway company to report to the city quarterly the number of trips made, and number of passengers carried, and punishing by fine the carrying of more than 18 passengers on the average, is a regulation reasonable in its nature, and is binding and valid.—*City of St. Louis v. St. Louis R. Co.*, 1 S.W. 305, 89 Mo. 44, 58 Am. Rep. 82.

**Sup. 1915.** Under Interstate Commerce Act, § 15, as amended by Act Cong. June 29, 1903, § 4, *held*, that carrier may make and file reasonable regulations touching the manner

in which shipments are to be made, and such regulations are enforceable.—*Donovan v. Wells Fargo & Co.*, 177 S.W. 839, 265 Mo. 291.

**Sup. 1917.** Under Laws 1913, p. 556, empowering the Public Service Commission to require equipment for the comfort of passengers, the commission may require a railroad to operate sleeping cars.—*State ex rel. Missouri Pac. Ry. Co. v. Atkinson*, 192 S.W. 86, 289 Mo. 634, L. R. A. 1918A, 46, Ann. Cas. 1917E, 987.

An order of the Public Service Commission requiring Pullman car service on a branch line is not necessarily unreasonable because entailing an operating loss on the branch line when considered separately from main line traffic.—*Id.*

**App. 1910.** An ordinance regulating street railways by providing that conductors shall not allow ladies or children to leave or enter the cars when the same are in motion is valid.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

#### 12. Charges.

Actions for excess of charge paid, see post, 202.

Charges for carriage of goods in general, see post, 188-197.

Charges for carriage of passengers in general, see post, 248½-261.

Liability of carrier to shipper for excess charged, see post, 200.

Penalties for violation of regulation, see post, 19, 20.

Repeal of statutes, see ante, 2.

#### 12 (1). Scope and validity of regulations in general.

**Sup. 1875.** A right conferred on a railroad corporation to regulate freight rates is subject to the inherent right of the state to make police regulations and to the common-law right of every citizen to hold a common carrier responsible for every violation of its duty as a common carrier.—*Sloan v. Pacific R. R.*, 61 Mo. 24, 21 Am. Rep. 397.

The Legislature in chartering a railway company may abandon the right to regulate the freight rates the company shall receive for transporting property.—*Id.*

**Sup. 1884.** Under Rev. St. 1879, §§ 833, 834, dividing all freight, to be shipped by rail, into classes, saw logs are included in class J, under the expression, "all heavy articles in car loads," although saw logs are not specifically mentioned at all.—*Burkholder v. Union Trust Co.*, 82 Mo. 572.

**Sup. 1908.** Under Rev. St. 1899, § 1136 (Ann. St. 1906, p. 975), prohibiting carriers from charging shippers more than the public tariff rates, such rate is compensation for the performance of all the carrier's common-law or statutory duties.—*George v. Chicago, R. I. & P. Ry. Co.*, 113 S.W. 1099, 214 Mo. 551, 127 Am. St. Rep. 690.

**Sup. 1909.** Demurrage Act, April 12, 1905 (Laws 1905, p. 110, § 5 [Ann. St. 1906, § 1082-5]), gives shippers or consignees 48 hours for loading or unloading cars of less than 60,000 pounds capacity, and 72 hours for cars of 60,000 pounds or greater capacity, and imposes a demurrage of not more than \$1 per car per day on all cars not tendered to the company within those periods. Rev. St. 1899, § 1163 (Ann. St. 1906, p. 1005), classifying freight, became effective the same time as the demurrage law, and places lumber, laths, etc., in class G, and section 1194, Rev. St. 1899, as amended by Scss. Acts 1905, p. 102 (Ann. St. 1906, p. 1005), fixes a rate for freight in class G in car load lots of 30,000 pounds minimum weight, not exceeding five cents per 100 pounds for the first 25 miles, one-half cent per 100 pounds for the second 25 miles, etc. *Held*, construing the demurrage act in connection with the statute, that the word "capacity" in the demurrage act did not refer to the estimated carrying capacity of the car, but to the weight of the load, so that the consignee of lumber weighing less than 60,000 pounds in a 60,000 pound capacity car, would be entitled to only 48 hours free time in which to unload.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 116 S.W. 530, 216 Mo. 658.

**Sup. 1915.** Under Rev. St. 1909, § 3111, railroad *held* not entitled to charge for team track storage any amounts above the statutory demurrage.—*State ex rel. Kansas City Southern Ry. Co. v. Public Service Commission*, 178 S.W. 55, 265 Mo. 399.

**Sup. 1916.** In a proceeding before Public Service Commission to determine freight rates, rights of the parties depend upon the status of their dealings which existed when complaint was filed, and not upon subsequent conditions or shipments.—*Lusk v. Atkinson*, 186 S.W. 703, 268 Mo. 109.

**Sup. 1917.** Public Service Commission Act, § 47, confers authority upon the Public Service Commission to raise railroad rates above maximum fixed by Legislature by Laws 1905, p. 102, as amended by Laws 1907, p. 171.—*State ex rel. Rhodes v. Public Service Commission of Missouri*, 194 S.W. 287, 270 Mo. 547.

Legislature has right to fix reasonable maximum rates for carriage of intrastate freight and passengers by railroads, even in absence of specific authority such as is contained in Const. Mo. art. 12, § 14.—*Id.*

Public Service Commission Act, § 47, conferring upon Commission power and duty to ascertain and establish reasonable maximum rates for carriage of persons and freight in intrastate traffic by railroads in state, is constitutional.—*Id.*

Legislature can fix maximum rate to be charged by railroads in Missouri for intrastate freight and passenger traffic without providing means in act itself for judicial review of fact of reasonableness of rate; and while it could not delegate such absolute power to the Public Service Commission, Public Service Commission Act by sections 110, 111, amply provides for a review of the Commission's orders.—*Id.*

**Sup. 1919.** Const. art. 12, § 20, prohibiting grant of right to construct street railway without consent of local authorities and that franchise granted shall not be transferred without similar assent, does not divest Legislature of authority, under the police power, to change rates of street railway.—*Kansas City v. Public Service Commission of Missouri*, 210 S.W. 381, 276 Mo. 539, error dismissed (1919) 40 S. Ct. 54, 250 U. S. 652, 63 L. Ed. 1190.

Laws 1913, p. 583, § 47, as to authority of Public Service Commission, *held* to empower commission to raise rates fixed by franchise agreement.—*Id.*

**App. 1905.** Rev. St. 1899, § 1092, requires railroads to furnish double-deck cars for shipment of sheep, and to allow shippers to load both decks to the aggregate of 20,000 pounds, and declares that it shall not be lawful for any railroad to charge for transportation of a double-deck car more than the legal rate of freight allowed for the shipment of stock. Section 1093 provides that if a railroad shall neglect to furnish double-deck cars it shall not charge for transportation of sheep more than one-half the legal rate of freight allowed for the shipment of stock. Sections 1193 and 1194 make a statutory classification of freight, and provide a maximum rate for "live stock in carloads." *Held*, that a carrier was not thereby required to charge the same rate for the shipment of sheep in two single-deck cars as was charged for the shipment of other live stock, so long as the rate charged for the shipment of sheep did not exceed the statutory

maximum rate fixed for live stock.—Wynn v. Wabash R. Co., 86 S.W. 562, 111 Mo. App. 642.

**App. 1906.** A carrier can acquire no right to impose an unlawful freight rate from the act of the board of railroad and warehouse commissioners approving the same.—McGrew v. Missouri Pac. Ry. Co., 94 S.W. 719, 118 Mo. App. 379.

12 (2). Local and through rates.

See explanation, page iii.

12 (3). Long and short haul.

**Sup. 1893.** Plaintiff shipped coal over defendant's railroad from C. to K., the rates charged being greater than rates advertised on the same date for shipments of coal over defendant's road in the same direction from M. to K., a greater distance. *Held* an unlawful discrimination, though no coal was actually shipped from M. to K. on the day on which plaintiff's coal was shipped, since defendant, in advertising a certain rate from M., must be deemed to have charged such rate within Rev. St. § 2637, making it unlawful for a carrier to "charge" a greater compensation for transportation of like kinds of property, under similar circumstances, for a shorter than a longer distance in the same direction.—Seawell v. Kansas City, Ft. S. & M. R. Co., 24 S.W. 1002, 119 Mo. 222, writ of error dismissed (1896) 17 S. Ct. 995, 41 L. Ed. 1179.

**Sup. 1926.** Long and short haul statute *held* impliedly repealed by later act (Rev. St. 1919, §§ 9974, 9986).—McGrew Coal Co. v. Mellon, 287 S.W. 450, 315 Mo. 798, certiorari denied (1927) 47 S. Ct. 456, 273 U. S. 752, 71 L. Ed. 874.

Statute *held* not to prohibit greater charge for short than longer haul in different directions under different conditions (Rev. St. 1919, § 9986).—*Id.*

Long and short haul statutes *held* impliedly repealed by Public Service Commission Act (Rev. St. 1919, §§ 9974, 9986, 10450).—*Id.*

12 (4). Passenger rates.

**Sup. 1927.** City of St. Louis may require, under penalty, that public observe its rules and regulations affecting rates of street railway.—*Ex parte* Packman, 296 S.W. 366, 317 Mo. 732.

12 (5). Reasonableness in general.

**Sup. 1892.** Where the term "car load," as used in Rev. St. 1879, § 833, providing for the appointment of railroad commissioners,

the division of freights into certain classes, and the fixing of maximum rates at so much per "car load" for each class, has been construed by the commissioners, whose duty it is to enforce the said statute, as meaning, in the light of existing usage, 10 tons instead of all that a car can safely carry, this construction, being reasonable and just, will be upheld, especially where it has been acted upon long enough to have become a rule.—Ross v. Kansas City, St. J. & C. B. R. Co., 19 S.W. 541, 111 Mo. 18.

**Sup. 1910.** The regulation of railroads is within the legislative power of the state, and the state may fix rates and authorize them to be charged and place them beyond the power of the interference of the courts on the ground that they are extortionate, and such rates, except for some constitutional or statutory provision so authorizing, cannot be adjudged by the court to be extortionate.—McGrew v. Missouri Pac. Ry. Co., 132 S.W. 1076, 230 Mo. 496; *Id.*, 166 S.W. 1033, 258 Mo. 23.

**Sup. 1914.** Under Public Utilities Act, §§ 47, 60, 127, Public Service Commission *held* empowered to authorize carrier to charge greater rates than the maximum rates prescribed in Rev. St. 1909, § 3231 et seq., where such maximum rates do not produce a reasonable return on the value of the carrier's property.—*State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 168 S.W. 1156, 259 Mo. 704.

**Sup. 1918.** Neither the Legislature nor its administrative agency can fix rates which are confiscatory of the property of the carrier.—*City of St. Louis v. Public Service Commission of Missouri*, 207 S.W. 799, 276 Mo. 509; *Same v. Public Service Commission*, 207 S.W. 805.

**Sup. 1921.** Rev. St. 1909, § 3241, prescribing a confiscatory rate for shipment of railroad ties by railroad given certain classification by section 3231, was void as to such confiscatory rate, regardless of whether the rates prescribed by the statute as a whole would give adequate returns on the investment.—*Hackworth v. Missouri Southern R. Co.*, 227 S.W. 1032, 286 Mo. 282, 15 A. L. R. 170.

**Sup. 1928.** That railroad earns reasonable profit on business as whole does not alone justify denying increase in rates for particular service.—*State ex rel. and to Use of Pugh v. Public Service Commission*, 10 S. W.(2d) 946.

⚡12 (6). Consideration of other lines or entire system in determining reasonableness of local rates.

See explanation, page iii.

⚡12 (6½). Proceedings before officers and commissions.

Sup. 1919. Rates violating Const. art. 12, § 12, and Rev. St. 1900, § 3173, prohibiting charging more for short than long hauls, are unlawful, and may be abrogated without a finding by the commission that they are unreasonable.—Missouri Southern R. Co. v. Public Service Commission, 214 S.W. 379, 270 Mo. 484.

Sup. 1924. Under Const. art. 6, §§ 1, 28, and 31, the Railroad and Warehouse Commission, or its successor, the Public Service Commission, has no jurisdiction or authority to determine the purely judicial question involved in a claim for damages by a shipper arising out of an excessive freight charge.—State ex rel. and to Use of Missouri Pac. R. Co. v. Public Service Commission, 259 S.W. 445, 303 Mo. 212.

⚡12 (7). Evidence as to reasonableness.

Sup. 1919. Evidence that a railroad operated two industrial spur tracks, each about five miles in length, charging rates covered by tariffs on file with the Public Service Commission, etc., held to sustain Commission's finding that such spurs were part of the railroad, although the railroad did not own the right of way upon which they were constructed and used a different kind of engine in operating on the spurs.—Missouri Southern R. Co. v. Public Service Commission, 214 S.W. 379, 270 Mo. 484.

Sup. 1921. A rate is presumed nonconfiscatory until its confiscatory character is made to appear.—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A. L. R. 170.

In action involving question of whether rates fixed by statute were confiscatory, it will be presumed that the rates previously charged were reasonable.—Id.

Sup. 1928. Evidence held to sustain Public Service Commission's finding that suburban passenger service was furnished at loss, and that increased rates approved by it would not yield appreciable profit.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.(2d) 946.

⚡12 (8). Raising rates lowered for purpose of competition.

See explanation, page iii.

⚡12 (9). Conditions in grant of franchise and agreements with municipalities.

Sup. 1918. Const. art. 12, § 20, prohibiting the General Assembly from granting the right to construct and operate a street railroad without consent of local authorities, confers no special authority upon the city to prescribe terms, conditions, and passenger fares which would not be subject to legislative control under the state's police power.—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509; Same v. Public Service Commission, Id. 805.

Const. art. 12, § 20, requiring a city's consent to construction and operation of a street railroad, neither grants nor prohibits the city from admitting upon terms and conditions including fixed fares, which power is incidental to the power to withhold consent, and a city so contracting acts under its general reserved powers subject to the public policy of the state.—Id.

A city ordinance authorizing construction and operation of a street railroad and fixing fares was subject to the unexercised power of the Legislature, now delegated to the Public Service Commission, to regulate and displace such rates, subject to judicial review.—Id.

⚡12 (10). Transfers to connecting lines of same company.

Sup. 1903. Rev. St. 1899, §§ 1112-1115, requiring delivery by the initial carrier of freight upon any track it owns, leases, or uses, or can use, does not prevent such initial carrier from assessing a reconsignment charge for delivering a shipment upon another track than that upon which it was originally placed.—State ex inf. Crow v. Atchison, T. & S. F. Ry. Co., 75 S.W. 776, 176 Mo. 687, 63 L. R. A. 761.

App. 1912. An ordinance requiring a street railway company to furnish transfers to enable passengers to go by reasonably direct routes does not deprive the company as a carrier from making reasonable rules.—Duke v. Metropolitan St. Ry. Co., 148 S.W. 166, 166 Mo. App. 121.

⚡13. Preferences and discriminations.

Discrimination apart from statutory regulations, see post, ⚡199.

Discriminations and overcharges in general, see post, ⚡202.

Exclusive privileges, see post, ⚡14.

Penalties for violation of regulations, see post, ⚡19, 20.

Statutory provisions, see ante, ⚡2.



13 (1). **Prohibition in general.**

**Sup. 1914.** Const. art. 12, § 14, and Rev. St. 1909, § 3232, forbidding discrimination, is binding upon the state, notwithstanding that by the Constitution railroads are declared to be public highways.—*State v. Missouri, K. & T. Ry. Co.*, 172 S.W. 35, 262 Mo. 507, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949.

Unjust discrimination in railroad rates was forbidden by common law.—Id.

**Sup. 1920.** Under Rev. St. 1909, § 3184, providing that it shall be unlawful for any common carrier to subject any particular person to any undue or unreasonable prejudice or disadvantage with respect to such transportation, motive is immaterial, and, in action for refusal to deliver a car of coal, ill will or disfavor between carrier and consignee need not exist.—*Alexander v. Chicago, M. & St. P. R. Co.*, 221 S.W. 712, 282 Mo. 236, 11 A. L. R. 867.

Rev. St. 1909, § 3184, forbidding a carrier to give any undue or unreasonable preference or advantage to any particular person, and also forbidding carrier to subject any particular person to any undue or unreasonable prejudice or disadvantage, creates two offenses, and it is not necessary to utter offense that it be shown that some one else was given a preference.—Id.

**Sup. 1926.** Common law did not prohibit mere unjust discrimination between localities, though prohibiting such discrimination between individual shippers.—*McGrew Coal Co. v. Mellon*, 287 S.W. 450, 315 Mo. 798, certiorari denied (1927) 47 S. Ct. 456, 273 U. S. 752, 71 L. Ed. 874.

**Sup. 1927.** Term "facilities," as used in statutory and constitutional provision regarding discrimination, includes only those employed in transportation and which railroad undertakes to furnish as common carrier (Const. art. 12, § 23; Rev. St. 1919, §§ 9975, 9985).—*Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis*, 294 S.W. 88, 316 Mo. 709.

Only those having right to demand particular service from carrier in its capacity as common carrier are protected by constitutional and statutory provisions regarding discrimination (Const. art. 12, § 23; Rev. St. 1919, §§ 9975, 9985).—Id.

**Sup. 1928.** That railroad's passenger rate is discriminatory does not render it unlawful, unless arbitrary and unreasonable; "unjust discrimination."—*State ex rel. and*

*to Use of Pugh v. Public Service Commission*, 10 S.W.(2d) 946.

**App. 1886.** Rev. St. § 821, provides that no railway company shall make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies or individuals, nor in the transportation of freight between commission merchants, and that any corporation violating the statute shall forfeit to the injured party the whole amount of such transportation charged. *Held*, that equity could not be invoked for the purpose of enforcing the same terms in favor of plaintiff as defendant railroad was granting to another.—*Chouteau v. Union Ry. & Transit Co.*, 22 Mo. App. 286.

**App. 1912.** Rev. St. 1909, §§ 3184, 3191, prohibiting discrimination by carriers, and authorizing recovery of triple damages therefor, applies only to intrastate commerce, and has no application to commerce between the states.—*Steel v. St. Louis, I. M. & S. Ry. Co.*, 147 S.W. 217, 165 Mo. App. 311.

**App. 1919.** It was unlawful for a carrier to charge or for a consignee to pay any less than the lawful rate published pursuant to Act Cong. June 29, 1906, § 2 (34 Stat. 586); neither rebates, concessions, or other deviations from such approved and published tariff rates being allowed, in view of Act Cong. Feb. 19, 1903 (32 Stat. 847).—*Mobile & O. R. Co. v. Laclede Lumber Co.*, 216 S.W. 798, 202 Mo. App. 630.

A consignee of an interstate shipment is charged with knowledge of the legal published tariff rates, and that rates fixed in a schedule of rates filed and published under acts of Congress are the only lawful rates; all persons being charged with knowledge of the law.—Id.

13 (2). **What constitutes discrimination.**

**Sup. 1904.** Where a railroad company charges higher rates for carrying freight a less distance than its published rates for carrying it a greater distance in the same direction over the same road, it violates Rev. St. 1899, §§ 1133, 1134, prohibiting discrimination between localities, or charging a greater rate for a shorter haul, though it does not actually carry any freight the greater distance.—*Cohn v. St. Louis, I. M. & S. Ry. Co.*, 79 S.W. 961, 181 Mo. 30.

**Sup. 1912.** Rev. St. 1909, § 3173, prohibiting discrimination in transportation charges as between long and short hauls of

the same class of freight on the same road, applies where the transportation is over the same road, but not where the two hauls are over different lines operated by different corporations, though they have common officers. —*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 147 S.W. 1052, 243 Mo. 224.

**Sup. 1914.** The one-cent militia fare law (Rev. St. 1909, § 8396) is not in violation of Const. art. 12, § 23, forbidding discrimination between or in favor of transportation companies and individuals. —*State v. Missouri, K. & T. Ry. Co.*, 172 S.W. 35, 262 Mo. 507, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949.

The one-cent militia fare law (Rev. St. 1909, § 8396) violates Const. art. 12, § 14, providing that the General Assembly shall pass laws to prevent unjust discrimination in passenger tariffs, etc., conceding that a one-cent fare is "unjust" discrimination. —*Id.*

Under Const. art. 12, § 14, forbidding unjust discrimination in railroad rates, it does not follow that because a discrimination is apparent, it is an unjust discrimination. —*Id.*

The one-cent militia fare law (Rev. St. 1909, § 8396) *held* to constitute unjust discrimination under Const. art. 12, § 14, in view of Rev. St. 1909, § 3232, fixing the maximum fare for adult passengers at two cents a mile. —*Id.*

**Sup. 1917.** An order of the Public Service Commission, made on complaint of traveling salesmen, fixing a different and lesser charge for storage of baggage on certain days for such travelers than was fixed by general order governing charges on baggage of other persons, was unfair, unreasonable, and void. —*Atchison, T. & S. F. Ry. Co. v. Public Service Commission of Missouri*, 192 S.W. 460.

**Sup. 1923.** A switch track for loading and unloading freight is clearly a "facility" within the meaning of Rev. St. 1919, § 9975, inhibiting discrimination by common carriers in charges or facilities. —*Tucker v. St. Louis-San Francisco Ry. Co.*, 250 S.W. 390, 298 Mo. 51, affirming judgment (App. 1921) 233 S.W. 512.

**Sup. 1928.** That 50-ride bearer commutation tickets sold at higher mileage rate than 10-ride tickets *held* not to establish unjust discrimination. —*State ex rel. and to Use of Pugh v. Public Service Commission*, 10 S.W.(2d) 946.

Mileage is not sole test in determining whether suburban passenger service rates are

unjust and discriminatory, but other circumstances are to be considered. —*Id.*

Arrangement of suburban passenger rates into groups is not invalid solely because it results in preference in mileage rate. —*Id.*

Evidence *held* not to show that Public Service Commission's order approving increased suburban passenger rates was unjustly discriminatory, unreasonable, or unlawful (Rev. St. 1919, § 10535). —*Id.*

**App. 1886.** A contract by a railway company with a shipper whereby it was agreed that he was to pay the regular tariff rates and then receive a rebate on every 100 pounds shipped was not within the prohibition of Rev. St. §§ 815, 821. —*McNees v. Missouri Pac. Ry. Co.*, 22 Mo. App. 224.

**App. 1898.** A clause in a contract whereby a railway company agreed to transport all grain in bulk which might be delivered to it by its lessees at his warehouse in quantities of not less than one full carload, at one time, to stations on its road, at a rate which would be less by 1 per cent. per 100 pounds for grain in bulk than the charges made by it to transient shippers, who delivered grain to it by wagons or otherwise, is not in violation of Rev. St. 1879, §§ 2620, 2630, 2632, the latter section providing that, if a railway company shall charge or receive from any person a greater or less compensation for any service rendered in the transportation of any kind of property on such railroad within the state than it charges or receives from any other person for doing for him a like service in the transportation of a like kind of property, under substantially like circumstances and conditions, such carrier shall be deemed guilty of unjust discrimination. —*American Cent. Ins. Co. v. Chicago & A. Ry. Co.*, 74 Mo. App. 80.

**App. 1905.** The charge of a higher freight rate for transportation of sheep than that fixed for the transportation of cattle and other live stock did not constitute a discrimination, within Rev. St. 1899, § 1129, providing that, if any carrier shall charge a greater or less compensation for any service in the transportation of any kind of property than it charges any other person for doing for him a "like service" in transportation of a "like kind of property" under substantially like circumstances and conditions, such carrier shall be deemed guilty of unjust discrimination. —*Wynn v. Wabash R. Co.*, 86 S.W. 562, 111 Mo. App. 642.

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Consult Pocket Part for later cases. For explanation, see page iii.

**App. 1911.** Rev. St. 1909, §§ 3107, 3121, requiring carriers to receive and carry live stock without discrimination, do not require all freight trains at a station to receive stock.—*Warner v. St. Louis & S. F. R. Co.*, 137 S. W. 275, 156 Mo. App. 523.

**App. 1926.** Unlawful preference *held* under facts not to have been given shipper of eggs by allowing him first to settle with first-named consignee, to whom they were delivered contrary to instructions, and thereafter file claim with defendant railroad.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

—13 (3). Circumstances justifying discrimination.

**Sup. 1911.** To constitute a violation of Rev. St. 1899, § 1133 (Ann. St. 1906, p. 974), making it unlawful for any carrier to give any undue or unreasonable preference to any particular person in the transportation of goods, a carrier must give an undue and unreasonable preference, and the question whether it has done so must be determined after considering honest competition not caused by its own act, and the cost of service, and where a carrier is required to meet competition not caused by its own act, it may fix its rate to meet it, though the effect may cause shippers to pay more for a short haul than for a long one.—*Cohn v. St. Louis, I. M. & S. Ry. Co.*, 133 S.W. 59, 151 Mo. App. 661, transferred from Supreme Court (1910) 131 S. W. 881, 227 Mo. 369.

To constitute a violation of Rev. St. 1899, § 1134 (Ann. St. 1906, p. 975), making it unlawful for any carrier to charge a greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances, for a shorter than a longer distance over the same line in the same direction, a carrier must charge more for a short haul than for a longer one where the circumstances are similar, and, where there is honest competition not caused by it, it may fix its rates to meet the competition though it causes shippers to pay more for a short haul than for a longer one.—*Id.*

A carrier giving preferences notwithstanding Rev. St. 1899, §§ 1133, 1134 (Ann. St. 1906, pp. 974, 975), prohibiting a greater charge for a shorter haul than for a longer one under similar circumstances and conditions, may consider river competition, though a steamboat carrier does not deliver the freight to the consignees, but the freight must be hauled in wagons from the river several miles away.—*Id.*

**Sup. 1914.** If the difference in railroad rates is based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination.—*State v. Missouri, K. & T. Ry. Co.*, 172 S.W. 35, 262 Mo. 507, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949.

—14. Exclusive privileges.

**Sup. 1890.** The owner of a bus line, who has made an approach to a depot platform under an oral agreement with the railway company that he should have its exclusive use, cannot confine the teams of the rival line to other parts of the platform, at which the chance of getting passengers is not so good, and to which in dry weather vehicles can be driven or backed up with some difficulty, while in wet weather it is very hard to do so; the agreement to give the exclusive privilege being against public policy and the spirit of Const. art. 12, § 23, which prohibits "discrimination charges or facilities in transportation \* \* \* between transportation companies and individuals, or in favor of either."—*Cravens v. Rodgers*, 14 S.W. 106, 101 Mo. 247.

**Sup. 1923.** Under Const. art. 12, § 23, prohibiting discrimination in charges or facilities between transportation companies and individuals, a union depot or terminal company cannot discriminate in favor of one taxicab owner or company by excluding others from its premises for the purpose of receiving or discharging passengers. (Per Woodson, C. J., and Walker, J.)—*Kansas City Terminal Ry. Co. v. James*, 251 S.W. 53, 298 Mo. 497.

A union depot or terminal company may properly grant to a taxicab company the exclusive right to maintain a taxicab stand inside the station, and it may grant to such company the right to carry passengers from the station to some destination, as for instance another depot, if the route is entirely over its own land; but it cannot create a monopoly in one taxicab company by excluding, under the guise or pretense of regulating and controlling the use of its private property, all other taxicabs from its plaza or approach, even though it owns the same and has never dedicated the ground to the public. (Per White, Ragland, and James T. Blair, JJ.)—*Id.*

**Sup. 1927.** Carrier may, in absence of statutory or constitutional provisions, grant exclusive privilege to one taxicab company to solicit patronage on station grounds.—*Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis*, 294 S.W. 88, 316 Mo. 709.

Carrier did not unlawfully discriminate against plaintiff taxicab company in granting exclusive privilege to one taxicab company to solicit patronage on station grounds (Const. art. 12, § 23; Rev. St. 1919, §§ 0975, 9985).—*Id.*

**App. 1909.** A lease or license by a railroad company of its land between its tracks and the river, held and treated by it as part of its right of way or depot grounds, constitutes a discrimination between shippers, in violation of Rev. St. 1899, § 1127 (Ann. St. 1900, p. 972); its effect, and presumably its intent, being to give one company, engaged in floating ties down the river for shipment by the railroad an advantage over others in the same business, in getting them to the cars.—*Hobart-Lee Tie Co. v. Stone*, 117 S.W. 604, 135 Mo. App. 438.

15. **Connections with and facilities to other carriers.**

**App. 1904.** The evident purpose the Legislature had in view in enacting Rev. St. 1899, § 1075, making it the duty of railroad corporations to stop all trains carrying passengers at the junction of other railroads a sufficient length of time to allow the transfer of passengers, baggage, etc., was to afford facilities to persons traveling on one railroad and destined to some point on another intersecting it.—*State ex rel. McPherson v. St. Louis & S. F. R. Co.*, 79 S.W. 714, 105 Mo. App. 207.

Rev. St. 1899, § 1075, requiring railroads to stop all trains carrying passengers, at the junctions of other railroads a sufficient length of time to allow the transfer of passengers personal baggage, mails, and express freight from the trains of the intersecting roads, does not require such roads to stop all trains at each intersection, whether or not there be any persons, baggage, mails, or express matter from the intersecting roads to be transferred; but, in order to establish a case under the statute, it is necessary to prove that on a day specified the railroad failed to stop a train at a junction point when there was a passenger, baggage, mail, or express matter from the connecting railroad to be transferred and carried on the train not stopping.—*Id.*

16. **Use of carrier's premises.**

**Sup. 1927.** Carrier's station grounds must be devoted primarily to public use to extent necessary for public objects to be accomplished by railroad.—*Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis*, 294 S.W. 88, 316 Mo. 709.

**App. 1890.** Where a city enacts a valid ordinance prohibiting hackmen and porters from soliciting custom and trade at railway depots within the city, the operation of such ordinance cannot be suspended by a railway company which assumes to authorize such a person to solicit business at its depot.—*City of Chillicothe v. Brown*, 38 Mo. App. 609.

**App. 1898.** Where the keeper of a hotel enters a depot and undertakes to perform the work of a "runner" for his house, he becomes subject to the regulation of an ordinance forbidding those soliciting trade or patronage for any hotel to enter the depot.—*City of Ladonia v. Poor*, 73 Mo. App. 465.

**App. 1898.** Where a city of the fourth class had power to regulate and license taverns, hotels, etc., and to regulate such occupations as hackmen, draymen, drivers, porters, etc., and to make all necessary ordinances for the welfare of the city, an ordinance, declaring it unlawful for any person to enter on any depot, platform, or on the premises of any railroad within the city for the purpose of soliciting trade or patronage for any hotel, was not unreasonable.—*City of Ladonia v. Poor*, 73 Mo. App. 465.

17. **Combinations of carriers.**

*See explanation, page iii.*

18. **Proceedings to enforce or to prevent enforcement of regulations.**

18 (1). **Remedies and judicial supervision in general.**

**Sup. 1912.** A voluntary unincorporated association held without legal authority to institute in its own behalf and for the benefit of another proceedings before the Railroad and Warehouse Commissioners challenging the reasonableness of switching charges.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 147 S.W. 1052, 243 Mo. 224.

Where a proceeding instituted before the Railroad and Warehouse Commissioners challenging the reasonableness of switching charges was not legally instituted by a party, as provided by Rev. St. 1909, § 3192, the party could not complain of the court's failure to render judgment as provided by sections 3201 and 3202.—*Id.*

18 (2). **Appeal from orders of officer or board.**

**Sup. 1928.** Public Service Commission had right to appeal from judgment reversing its order respecting railroad passenger rates and to be represented thereon by its general

counsel (Rev. St. 1919, § 10525, and § 10416 as amended by Acts 1923, p. 330).—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.(2d) 940.

**18 (3). Actions to enforce or set aside decisions of officer or board.**

*See explanation, page iii.*

**18 (4). Proceedings to enforce regulations as to connections with or facilities to other carriers.**

*See explanation, page iii.*

**18 (5). Remedies of persons aggrieved by discriminations.**

**Sup. 1904.** In an action against a railroad company, under Rev. St. 1899, §§ 1133, 1134, for discrimination in freight charges, where there were several acts of discrimination, it is not necessary to state each as a separate cause of action.—Cohn v. St. Louis, I. M. & S. Ry. Co., 79 S.W. 961, 181 Mo. 30.

Though, in an action against a railroad, under Rev. St. 1899, § 1136, for unreasonable charges, the plaintiff must show that the charges were more than the rates fixed by the carrier and approved by the Board of Railroad Commissioners, such a showing is not necessary in an action under sections 1133 and 1134 for discrimination between localities, and for charging a higher rate for a shorter than for a longer haul.—*Id.*

In an action against a railroad company for the violation of Rev. St. 1899, § 1133, prohibiting railroads from giving any unreasonable advantage to any locality, or subjecting any locality to unreasonable disadvantage, and section 1134, prohibiting them from charging higher rates for a shorter than for a longer haul, a petition alleging that the defendant has charged the plaintiffs a higher rate for shipping freight from a certain point to their station than its published tariffs from the same point in the same direction to stations at a greater distance—specifying the difference in the charges, and the amount on which the excessive freight was paid, and alleging that merchants doing business at the other points were given an undue advantage over plaintiffs—sufficiently states in what way they were injured by defendant's acts.—*Id.*

**18 (6). Injunction.**

*See explanation, page iii.*

**19. Damages for violations of regulations.**

Measure of damages in absence of statutory provisions as to damages, see post, 201.

**Sup. 1884.** Under Rev. St. 1879, § 835, allowing the recovery of treble damages for illegal freight charges, a petition alleging that plaintiff shipped two car loads of saw logs over defendant's road, a distance of over 25, and under 50 miles, and that defendant charged, and the plaintiff paid, an excess over the legal rates allowed defendant for such freight, is sufficient without alleging to what class of freight the shipment belonged.—Burkholder v. Union Trust Co., 82 Mo. 572.

**Sup. 1884.** Plaintiff brought an action under Rev. St. 1879, § 835, to recover penalty for overcharges for transportation. Each count in the petition set up the difference between the two points between which plaintiff's freight had been carried, the legal rate of charges, the amount charged, and the excess, and the petition further contained a prayer for judgment, and that the damages be trebled "according to the provision of section 835 of the statute of this state." *Held*, that the petition was sufficient, as the statute under which the action was brought was a public act and it was only necessary to state the facts which bring the case within the law.—Reynolds v. Chicago & A. R. Co., 85 Mo. 90.

**Sup. 1900.** Act March 31, 1887, relating to damages to live stock resulting from defective cars, did not provide that treble damage could be recovered from the carrier. Sess. Acts 1889, p. 105, authorizing the recovery of treble damages for certain injuries by carriers, did not include damages resulting from defective cars. Both sections were incorporated in *hac verba* into Rev. St. 1889, §§ 2590, 2591, 2597, in chapter 42, art. 2, relating to railroads. Rev. St. 1889, § 6006, provided that all acts of a general nature, re-enacted therein, should be construed as a continuation of such laws, and not new enactments. *Held*, that treble damages could not be recovered for injuries to live stock resulting from defective cars, as the re-enactment did not make the separate statutes part of the same act.—Paddock v. Missouri Pac. Ry. Co., 56 S.W. 453, 155 Mo. 524.

**Sup. 1904.** Where a railroad company violated Rev. St. 1899, §§ 1133, 1134, prohibiting discrimination in freight charges, one damaged thereby, is entitled, under the express provisions of section 1140, to recover three times the amount of his damages, and a reasonable attorney's fee, to be taxed as part of the costs.—Cohn v. St. Louis, I. M. & S. Ry. Co., 79 S.W. 961, 181 Mo. 30.

**Sup. 1920.** A petition for treble damages and attorney's fees for refusal of carrier to

deliver car of coal in violation of Rev. St. 1909, § 3184, making it unlawful for a common carrier to subject any one shipper or consignee to any undue or unreasonable prejudice or disadvantage, need not charge that shipment was an intrastate one, since, if shipment was an interstate one, exclusively within purview of federal statutes, that would be a matter of defense.—*Alexander v. Chicago, M. & St. P. R. Co.*, 221 S.W. 712, 282 Mo. 236, 11 A. L. R. 867.

**App. 1889.** A petition alleged that defendant is a railroad corporation within the state of Missouri, operating a railroad between certain points, that plaintiff offered defendant a car load of hogs for transportation between certain points, the distance being more than 125 miles and less than 138 miles, and that the rate prescribed by Rev. St. §§ 833-834 amounted to a sum of \$31, that defendant wrongfully refused to ship the hogs for such rate, and demanded, and plaintiff was compelled to pay under protest, the sum of \$40 therefor, wherefore plaintiff demanded the difference, or the sum of \$9 and other appropriate relief. *Held* that, though such petition did not in fact contain a prayer to recover the penalty of treble damages provided for by section 835, it nevertheless stated a cause of action for a penalty under such section, it being proper for the court, after verdict in favor of plaintiff, to treble the sum, under the statute, on motion.—*Young v. Kansas City, St. J. & C. B. Ry. Co.*, 33 Mo. App. 509.

An action against a carrier to recover three times the amount of an overcharge for freight shipped as authorized by Rev. St. § 835 is an action to recover penalty.—*Id.*

**App. 1890.** In an action based on Rev. St. 1879, § 844, to recover three times the amount of excess charged and received by defendant, where defendant denies that a rate was fixed by the commissioners, the burden is on the plaintiff to establish such fact. And failing to do so he should not be permitted to recover under this section without amending his petition.—*Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 194.

Where an action was brought under Rev. St. 1879, § 844, to recover three times the amount of excess charged plaintiff, and at the trial plaintiff failed to prove that any of the charges had been fixed by the railroad commissioners as provided by sections 842, 844,

he was not entitled to recover as if his action had been based on section 835.—*Id.*

**App. 1895.** Where the statute (Rev. St. 1889, § 2590) requires railroad companies to furnish stock cars with trapdoors in the top, and provides a penalty for failure to do so, the fact that the shipper knew that the car furnished him had no trapdoors will not estop him from claiming damages for injuries resulting from the lack of such doors.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

Under Rev. St. 1889, § 2590, requiring railroad companies to furnish stock cars with trapdoors in the roof, one at each end, and making the companies liable to all persons damaged by failure to furnish such cars, and reasonable attorney's fees, construed in connection with section 2597, authorizing the recovery of treble damages, an action for failure to put in trapdoors to recover treble damages and attorney's fees is authorized.—*Id.*

**App. 1901.** Plaintiff brought an action against defendant on five separate causes of action set forth in five counts. The second and fifth counts were based on Rev. St. 1889, § 2636, which declares it to be unlawful for a common carrier to give one person any undue or unreasonable advantage or preference, or subject any person to an unreasonable prejudice or disadvantage. Said counts charged that defendant gave to a certain shipper an advantage over plaintiff in the shipment of coal in the way of better rates. The third and fourth counts were based on Rev. St. 1889, § 2637, which makes it unlawful for a common carrier to charge for the same kind of property a greater sum for a short distance than is charged for a longer distance. Said counts alleged that defendant violated said statute in shipments made by plaintiff wherein he was charged a greater sum for a shipment than was another shipper for a shipment to a greater distance than plaintiff's shipment. Plaintiff sought judgment for \$1,000 on all four counts, as provided for by Rev. St. 1889, § 2663, and his prayer for relief was to the effect that he was aggrieved in the premises, and that a cause of action had accrued to him to demand and sue for the sum of \$1,000 and costs of suit for such offense, and prayed judgment for such sum of \$1,000 in costs according to the statute in such cases made and provided, and for all other and general relief to which he might be entitled. The provisions of the statute upon which the action was based were carried forward into the Revision of 1889 from Extra Sess. Acts 1887, p. 16,

§ 3, which said act also provided as a penalty for the violation of its provisions treble damages sustained as well as an attorney's fee. *Held*, that plaintiff was entitled to recover treble damages, notwithstanding his prayer for relief was based upon section 2663.—*McGrew v. Missouri Pac. Ry. Co.*, 87 Mo. App. 250.

**App. 1922.** Discrimination in furnishing cars *held* for jury in suit under Rev. St. 1919, §§ 9985, 9990, for treble damages.—*Stroud v. Missouri Pac. R. Co.*, 236 S.W. 801, 210 Mo. App. 311.

In a suit for treble damages for discrimination in preferring shippers who ordered and were furnished cars after plaintiff ordered cars for shipping lumber wherein defendant endeavored to show cars furnished others on subsequent orders were for shipping mine material, preferred by an Interstate Commerce Commission order, and the evidence showed some cars so furnished were for such material, and some of the preferred shippers shipped lumber and mine material, an instruction for plaintiff based on a preference of other shippers, requiring the jury to find that after plaintiff's cars were ordered other shippers at the station in question "engaged in the business of shipping lumber," ordered cars, and were preferred, was erroneous in not requiring the jury to find that such cars were not loaded with mine material.—*Id.*

**App. 1923.** In an action under Rev. St. 1919, §§ 9985 and 9990, to recover treble damages for alleged preference in furnishing cars for shipping lumber, it is no defense that the favored shipper was engaged in interstate shipping, and an instruction in such an action which did not require a finding that the favored shipment was an intrastate shipment *held* not erroneous.—*Stroud v. Missouri Pac. R. Co.*, 254 S.W. 111, 212 Mo. App. 512, certiorari granted *Missouri Pac. R. Co. v. Stroud*, 44 S. Ct. 37, 263 U. S. 694, 68 L. Ed. 510, and judgment reversed (1925) 45 S. Ct. 243, 267 U. S. 404, 69 L. Ed. 683.

Failure of an instruction in an action to recover treble damages for discrimination in furnishing cars to require a finding that such discrimination was undue or unreasonable does not render it erroneous, where plaintiff's evidence tends to show that the discrimination complained of was as a matter of law undue and unreasonable.—*Id.*

In an action for treble damages for discrimination in furnishing cars to a shipper of lumber, an instruction on the measure of

damages requiring the jury to take into consideration the reasonable value of plaintiff's lumber at the date the cars should have been delivered and the reasonable market value of the lumber at the time they were delivered, the verdict to be for the difference between these two amounts not to exceed the amount prayed for *held* proper.—*Id.*

In an action by a shipper of lumber for treble damages for discrimination in the furnishing of cars, *held*, that an award of \$1,000 actual damage was in excess of the recovery authorized by the complaint, and such infirmity was not cured by testimony that plaintiff instead of 20,000 feet of lumber, as alleged, had more than 32,000 feet ready for shipment.—*Id.*

## 20. Penalties for violations of regulations.

Statutory provisions, see ante, 2.

### 20 (1). In general.

**Sup. 1912.** Statute requiring Railroad and Warehouse Commissioners to investigate reasonableness of rates including switching charges, and imposing penalties is penal, and must be strictly construed.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 147 S. W. 1052. See Carriers, 2 in this Digest.

### 20 (2). Carriage of passengers in general.

**App. 1906.** Rev. St. 1899, § 1100, provides that "all baggage, when taken for transportation, shall be checked," etc., and, if a check is refused on demand, the corporation shall pay the passenger the sum of \$10 and certain other penalties. *Held* that, where a carrier's agent refused to accept plaintiff's trunk "for transportation" because there was an attachment out for it, plaintiff was not entitled to recover, under such section, for the carrier's refusal to check the same.—*Mitchell v. Kansas City, C. & S. Ry. Co.*, 90 S.W. 1164, 116 Mo. App. 116.

### 20 (3). Discrimination.

**Sup. 1923.** Rev. St. 1919, § 9975, providing "no railway company \* \* \* shall hereafter make any discrimination \* \* \* in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and individuals, in favor of either, by abatement, drawback or otherwise," and prescribing a penalty for its violation, *held* not to authorize a shipper who had been denied the use of a certain switch, the exclusive use of which was accorded another, to recover the penalty

provided for unlawful discrimination.—*Tucker v. St. Louis-San Francisco Ry. Co.*, 250 S. W. 390, 298 Mo. 51, affirming judgment (App. 1921) 233 S.W. 512.

**Sup. 1923.** Under Rev. St. 1919, § 9975, providing a penalty for discrimination in facilities in transportation of freight between "commission merchants or other persons engaged in the transportation of freight" and individuals, the rule of *ejusdem generis* prevents inclusion of all other shippers, such as lumber dealer or sand dealer, in phrase "or other persons engaged" etc., since the definition of "other" is "other such like," and the term "commission merchants" does not designate an all-inclusive class, but the term, while used synonymously with "factor," "broker," etc., is not always synonymous, and intent to include discrimination between individuals not being clear.—(App. 1921) *Tucker v. St. Louis-San Francisco Ry. Co.*, 233 S.W. 512, judgment affirmed 250 S.W. 390, 298 Mo. 51.

#### 20 (4). Overcharge.

**Sup. 1884.** A railroad which collects a freight charge beyond the terminus of its line to the destination of the goods on the line of a connecting carrier cannot be subjected to the penalty imposed by Rev. St. §§ 833-835 for overcharge, where it undertakes to transport the goods to their destination without other cost to the shipper.—*Owen v. St. Louis & S. F. Ry. Co.*, 83 Mo. 454.

**Sup. 1884.** It is no defense in an action to recover penalties for overcharges for transportation by a railroad company, brought under Rev. St. 1879, § 835, that there was a special contract between plaintiff and defendant fixing the charges.—*Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

#### 20(5)-20(9½). See explanation, page iii.

##### 20 (5). Failure to furnish cars.

##### 20 (5½). Carriage of live stock.

##### 20 (6). Connections with and facilities to other carriers.

##### 20 (7). Amount and computation of penalty.

##### 20 (8). Persons entitled to sue.

##### 20 (9). Jurisdiction and venue.

##### 20 (9½). Parties.

##### 20 (10). Pleading and process.

**Sup. 1884.** A petition in an action to recover penalties for overcharges for transportation is not vitiated by charging that the maximum rate allowed by law was \$20.50, although the actual rate permitted by law was \$22.50.

—*Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

**Sup. 1892.** A petition to recover a penalty against a railroad company for failure to furnish double-decked cars for sheep, on request, need not state that the point to which plaintiff's sheep were to be shipped was a station on the defendant's road, where it alleges that "the defendant was conducting a general passenger and freight business over the line of its railroad" between the point of shipment and the point of destination.—*Emerson v. St. Louis & H. Ry. Co.*, 19 S.W. 1113, 111 Mo. 161.

**Sup. 1893.** Rev. St. 1889, § 2639, provides that railroad corporations shall print schedules showing the rates of freight established by them, not to exceed the maximum rates established by law; that copies shall be posted in every depot, and filed with the railroad commissioners; and that from the date of such filing the rates scheduled shall not be in excess of statutory maximum rates thereafter in force, and shall be deemed the established rates until changed as provided by this act. Section 2631 provides that all railroads of the state shall be common carriers, and prohibits unreasonable charges. Section 2643 provides that on violation of these sections the person injured may recover three times the amount of damages sustained. *Held*, in an action to recover penalties for charging plaintiff unreasonable rates on coal shipped by him over defendant railroad company's line, that a petition which failed to allege that the rates charged were in excess of the rates fixed by defendant and filed with the railroad commissioners and posted in defendant's depots, and which also failed to state that the charges were in excess of the maximum rates fixed by the railroad commissioners or by the statute, stated no cause of action.—*McGrew v. Missouri Pac. Ry. Co.*, 21 S.W. 463, 114 Mo. 210.

#### 20 (11). Evidence.

**App. 1904.** Testimony that witness was required to leave a limited train on defendant's road before reaching his destination, which was a junction point, and to take a local train that stopped at his destination, is immaterial, in an action to recover the penalty prescribed by Rev. St. 1899, § 1075, for failure of a railroad to stop trains at junctions.—*State ex rel. McPherson v. St. Louis & S. F. R. Co.*, 79 S.W. 714, 105 Mo. App. 207.

#### 20(12)-22. See explanation, page iii.

##### 20 (12). Trial and instructions.

See explanation, page iii.



21. Offenses by carriers or their agents.

21 (1). In general.

21 (2). Discrimination and overcharge.

21 (3). Recommendation of railroad commission.

21 (4). Indictment.

21 (5). Trial.

22. Offenses by persons dealing with carriers.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

Charges for carriage of goods in general, see post, 188-197.

Charges for carriage of passengers in general, see post, 248½-261.

23. Statutory provisions.

Sup. 1917. Statutes prohibiting the charging of discriminating freight rates are to be construed according to their evident purpose.—*Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 194 S.W. 281, 270 Mo. 629, L. R. A. 1918A, 768.

App. 1889. Interstate Commerce Act, §§ 2, 3, prohibiting discrimination by interstate carriers as to freight rates charged, was not prospective only, but operated to invalidate existing contracts between shippers and carriers for freight rebates in force at the time the act took effect.—*Southern Wire Co. v. St. Louis, Bridge & Tunnel R. Co.*, 38 Mo. App. 191.

App. 1913. Equality and uniformity of freight rates is the principal consideration in construing the Interstate Commerce Act and regulations adopted thereunder.—*St. Louis Southwestern Ry. Co. of Texas v. Spring River Stone Co.*, 154 S.W. 465, 169 Mo. App. 109.

24. Subjects of regulations.

App. 1919. With respect to services governed by the federal Interstate Commerce Act as amended by Elkins Act, the rule that both carrier and shipper are bound by and cannot alter the terms of service as fixed by the filed regulations applies, not only to rates, but also to other stipulations relating to service facilities within the purview of the act.—*Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531, 201 Mo. App. 609.

25. Carriage of particular articles.

See explanation, page iii.

26. Charges in general.

App. 1905. The statutory classification of freights (Rev. St. 1890, § 1193), and the rulings of the State Railroad Commissioners, are inapplicable to interstate shipments.—*Greason v. St. Louis, I. M. & S. Ry. Co.*, 86 S. W. 722, 112 Mo. App. 116.

App. 1911. Where freight rate has been duly fixed by Interstate Commerce Commission and posted, lesser rate contracted for between shipper and company is not binding, and the company can hold freight until legal rate is paid.—*Sutton v. St. Louis & S. F. R. Co.*, 140 S.W. 76. See Carriers, 35 in this Digest.

App. 1919. Where a shipper delivered an interstate shipment of goods to a carrier and directed it to be sent over a route having an established through charge, the initial carrier was charged with the duty to make necessary notations on the waybill, and the shipper had the right to assume compliance with that duty, and he was not responsible for any misrouting.—*Lancaster v. Schreiner*, 212 S.W. 19, 202 Mo. App. 459.

In an action by a carrier to recover charges, where neither the bill of lading nor the waybill issued by the initial carrier was introduced in evidence, it must be presumed that they designated the routing of the shipment as stated in a receipt issued by such carrier to the shipper, especially in view of Interstate Commerce Act, § 20, providing a penalty for issuing a false bill of lading.—Id.

A connecting carrier receiving a shipment of goods which was not routed over its line will be charged with knowledge that it was aiding in misrouting the shipment, where the bill of lading and waybill designated the proper route.—Id.

An interstate carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates, and the shipper must make good any deficiency not collected, regardless of the cause, freight rates established by the approval of the Interstate Commerce Commission dominating every shipment and contract, and this rule applies to a through rate made up of the sum of local rates of connecting carrier.—Id.

Where a shipper delivers goods to a carrier, he is entitled to have the goods sent over the cheapest route, and that without even making a selection.—Id.

In case an interstate shipment of freight is misrouted so that the shipper or consignee is compelled to pay a larger amount of freight charges than the established through rate, the carrier or carriers, whether initial or connecting, which are guilty of the misrouting must stand the loss, and cannot collect the excess charges caused by the misrouting, and, if paid by the shipper or consignee, must refund the overcharge, especially in view of Interstate Commerce Rule 214, § (d), relating to misrouting shipments.—*Id.*

Where shipper ascertained through rate and designated the proper route and paid the correct amount of charges for the through shipment, the initial carrier was responsible for the through shipment, though part of the route was over a connecting carrier, the connecting carrier becoming in a measure at least the agent of the initial carrier to complete the shipment, and there was such contractual relation between the two carriers that the connecting carrier could hold the initial carrier for its lawful share of freight charges.—*Id.*

The spirit of the Interstate Commerce Act with the Carmack Amendment is to treat connecting lines of transportation as one line so far as the shipper is concerned, and to compel the different companies forming a through route to deal as a unit with the shipper, and to then adjust all differences as to individual liability among themselves, and thus, where a shipment was misrouted and the proper charges were paid to the terminal carrier, such terminal carrier should not be allowed to sue the shipper for the local established charges over the actual route of the shipment, but should be required to settle the matter with the other carriers, because to collect the money from the shipper would be to collect money for the benefit of an offending carrier, money which must again be returned to the shipper by the offending carrier.—*Id.*

**App. 1923.** As used in a tariff rule as to lumber dressed and planed in transit at C., Miss., an intermediate point, into which charges at the local rate are paid, and re-shipped and rebilled at a through rate from point of origin, providing that, "The agent will then refund reshipper charges into C., Miss., less 2 cents per 100 pounds, with minimum of \$6 per car based on the rebilled weight," the word "charges" refers to the total amount charged the reshipper and paid by him for carriage into such place, and does not refer to the charges into it for the carriage of the rebilled lumber, and this con-

struction would not make the tariff illegal as requiring the carrier to transport the lumber to the intermediate point without collecting its published tariff for such transportation.—*Southern Ry. Co. v. Berthold & Jennings Lumber Co.*, 247 S.W. 219.

**App. 1923.** Interstate Commerce Act, § 6, par. 7 (49 USCA § 6, par. 7), requiring uniform charges for interstate transportation, does not apply where the carrier is transporting material to be used by a contractor for the upkeep of the carrier's own road, in view of the provision of 49 USCA § 1, par. 8, prohibiting the transportation of any article produced by the carrier except such as may be intended for its own use.—*Devine v. Meramec Portland Cement & Material Co.*, 253 S.W. 444.

#### ←27. Special rates.

*See explanation, page iii.*

#### ←28. Charges for long and short hauls.

*See explanation, page iii.*

#### ←29. Pooling or dividing freights or earnings.

*See explanation, page iii.*

#### ←30. Schedules of rates.

Schedule as basis for limiting liability, see post, ←218(5).

**Sup. 1906.** Interstate Commerce Act, § 6, providing, relative to a common carrier engaged in interstate commerce over a line owned entirely by it, that it shall post printed copies of its schedules of rates for the use of the public in two public and conspicuous places in every station where freight is received for transportation, in such form that they shall be accessible to the public, and can be conveniently inspected, is not satisfied by the station agent having copies of the schedule, and the posting of a notice of this fact, and that they can be inspected on application, so as to put into effect the further provision of the section that when the carrier shall have established and published its rates in compliance with the provision of the section, it shall be unlawful for the carrier to charge a smaller rate than specified in such published schedules.—*Wabash R. Co. v. Sloop*, 98 S.W. 607, 200 Mo. 198.

**Sup. 1917.** The fact that a carrier charged freight rates as "regular," and shipper paid them, is sufficient to show that they were "established" rates as required by Interstate Commerce Act, § 6.—*Foster Lumber*

Co. v. Atchison, T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L. R. A. 1918A, 768.

**App. 1906.** The posting of copies of rates at a railroad station, where they are afterwards torn down, is not a compliance with the interstate commerce act, requiring a carrier to keep copies of its schedule of rates posted at its stations, etc.—Griffin v. Wabash R. Co., 91 S.W. 1015, 115 Mo. App. 549.

**App.** The filed and published freight rates for an interstate shipment are conclusive as to the rate to be charged.—(1908) Mires v. St. Louis & S. F. R. Co., 114 S.W. 1052, 134 Mo. App. 379; (1919) Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo. App. 609; Bush v. Miller, 216 S.W. 989, 205 Mo. App. 38; (1920) Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo. App. 328.

**App. 1908.** Where a carrier has promulgated its rates under the interstate commerce law, and has complied with the statute by filing a copy of the schedule with the commission, deposited a copy with its agent, and posted copies in two conspicuous places in the depot, shippers are presumed to know the existence of the schedules and the rates contained therein.—Mires v. St. Louis & S. F. R. Co., 114 S.W. 1052, 134 Mo. App. 379.

**App.** Failure of carrier to post in its station a copy of rates filed with Interstate Commerce Commission will not relieve carrier or shipper from its binding effect.—(1908) Mires v. St. Louis & S. F. R. Co., 114 S.W. 1052, 134 Mo. App. 379; (1919) Bush v. Miller, 216 S.W. 989, 205 Mo. App. 38.

**App. 1912.** In order to establish an interstate freight rate, under the Interstate Commerce Act as it stood in 1908, the carrier is bound to file the schedule with the Interstate Commerce Commission, and promulgate and distribute the tariff in printed form in the offices of its agents.—Hunter v. St. Louis & S. F. R. Co., 150 S.W. 733, 167 Mo. App. 624.

**App. 1914.** Under laws regulating interstate commerce, shipper cannot recover for negligence of railroad agent or clerk in quoting freight rates for interstate shipments.—Sloop v. Delano, 170 S.W. 385. See Carriers, 36 in this Digest.

**App. 1916.** Tariff sheet of railroad naming rates on coal between two points and a common destination within the state, the higher rate being named for the shorter dis-

tance, held not affected by the clause, "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line."—Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co., 190 S.W. 650, 196 Mo. App. 154.

**App. 1919.** Under the federal law, a shipper is bound to take notice of the filed tariff rates, and, so long as they remain operative, they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo. App. 609.

**App. 1919.** If a railroad violated the law with reference to publication and posting of a new tariff at stations affected, such violation did not nullify the rate or tariff as approved by the Interstate Commerce Commission after filing with it, but merely subjected the railroad to the penalty provided by the Interstate Commerce Act.—Bush v. Miller, 216 S.W. 989, 205 Mo. App. 38.

**App. 1920.** Tariff rules and regulations in schedules filed with the Interstate Commerce Commission, relating to conditions upon which a shipper might be permitted to divert or reconsign a shipment in transit by exchanging bills of lading are under the Commerce Act binding on the parties; this being a service in connection with the transportation.—Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo. App. 328.

**App. 1923.** Whether tariff schedules filed by a carrier as reissues were effective retroactively is immaterial, where such schedules had been on file for the time required by the order of the Interstate Commerce Commission, before the shipments, on which the carrier seeks to impose such tariff were made.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo. App. 117.

Where a 16-cent tariff rate on cypress lumber was permitted by the Interstate Commerce Commission to remain the legally filed and published rate, it was the duty of plaintiff, delivering carrier, to charge that rate so long as it was actually on file and published at the time the freight moved, regardless of the interpretation that should be given to a previous decision of the Commission in which the carriers were directed to cancel such rates as were found by the Commission to be unreasonable.—Id.

If a tariff rate was unreasonable, the only way it could be changed so as to re-

Heve the carrier from the obligation of applying that rate was to require the carrier under Interstate Commerce Act, § 6, to print new schedules showing the changes, or by indicating them upon schedules already enforced, but until that was done the carrier must charge the rate, even though the enforcement of the statute involves a hardship.—Id.

The legal rate is the filed rate, and it is the duty of the carrier to charge and collect the rate precisely as the same is contained in the tariffs on file with the Interstate Commerce Commission, and this is true even though such rate be excessive, unreasonable, and unlawful.—Id.

**App. 1926.** Carrier's schedules for live stock shipments on file with Interstate Commerce Commission *held* not to limit carload to 28 horses, other than for rate purposes.—*Shaffer v. American Ry. Express Co.*, 282 S.W. 725.

### 31. Change of rates.

*See explanation, page iii.*

### 32. Preferences and discriminations.

Waiver of rights under limitation of liability, see post, 218(11).

#### 32 (1). In general.

**Sup. 1914.** The word "family," in Interstate Commerce Act, prohibiting the issuance of any pass except to employes and their families, means a collective body of persons living in one house under one head, and does not include the father of an adult employe not living with him nor dependent on him.—*Wentz v. Chicago, B. & Q. R. Co.*, 168 S.W. 1166, 259 Mo. 450, Ann. Cas. 1916B, 317.

**Sup. 1917.** The purpose of the Interstate Commerce Act is not merely to compel honest competition among carriers, but to prevent unjust discrimination among shippers.—*Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 194 S.W. 281, 270 Mo. 629, L. R. A. 1918A, 768.

Common carriers are public servants, and obliged to serve the public with indiscriminate justice.—Id.

Interstate Commerce Act, prohibiting discriminating freight rates, is not limited to fraudulent schemes, but covers every case where discrimination exists.—Id.

**App. 1889.** Where, at the time a contract was made between a carrier and a favored shipper for freight rebates, the car-

rier was charging the public generally a higher rate of freight than that provided for in the contract, such contract could not be sustained after the passage of the interstate commerce act, prohibiting carriers from discriminating in rates, on the ground that the carrier might have complied with the statute by making a rate no higher than that allowed to the favored shipper, so that its voluntary act in making a higher rate would not abrogate the favored shipper's contract.—*Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.*, 38 Mo. App. 191.

**App. 1914.** Interstate Commerce Act, § 2, prohibiting unjust discrimination in rates and fares, and section 3, prohibiting undue preferences, apply to the transportation of passengers, as well as to the carriage of property.—*Ligon v. St. Louis & S. F. Ry. Co.*, 168 S.W. 647, 184 Mo. App. 187.

**App. 1920.** Where a carrier agreed to transport corn from a point in the United States into Mexico without reloading into other cars, the provision, even if discriminatory, will not render the contract invalid; the discrimination in no sense being unjust.—*Brunswick v. Bush*, 221 S.W. 759, certiorari dismissed *Bush v. Brunswick*, 41 S. Ct. 9.

**App. 1923.** Carrier must collect rate as contained in tariffs filed with Commission though excessive, unreasonable, and unlawful.—*Mobile & O. R. Co. v. Southern Sawmill Co.*, 251 S.W. 434. See Carriers, 30 in this Digest.

**App. 1925.** Express company not liable for mistake of agent in violating commerce commission rules.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

#### 32 (2). What constitutes preference or discrimination.

**App. 1916.** A stipulation limiting liability of carrier, or fixing time and manner of giving notice or presenting claims, being a condition precedent to a right of action by shipper, cannot be waived by carrier.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282.

**App. 1916.** A provision in bill of lading issued upon an interstate shipment, requiring claims for loss or damage to be made within four months after delivery, could not be waived.—*Kemper Mill Co. v. Missouri Pac. Ry. Co.* 186 S.W. 8, 193 Mo. App. 466, transferred from Supreme Court (1915) *Kemper Mill & Elevator Co. v. Same*, 178 S.W. 502.

**App. 1916.** Railroad, by accepting and receiving shipper's claim for loss after four

months stipulated in bill of lading has elapsed, and by declining to pay on other grounds than want of notice, cannot commit a discrimination by waiving the requirement of notice in four months.—*Banaka v. Missouri Pac. R. Co.*, 186 S.W. 7, 193 Mo. App. 345.

**App.** Carrier has no power to waive violations of terms of contract of shipment made pursuant to Interstate Commerce Act.—(1916) *Donoho v. Missouri Pac. Ry. Co.*, 187 S.W. 141, 193 Mo. App. 610, transferred from Supreme Court, 184 S.W. 1149; (1917) *Barton v. Louisville & N. R. Co.*, 196 S.W. 379.

**App.** 1918. In action under Carmack Amendment against initial carrier of certain interstate shipments, there could be no recovery on theory that carrier had waived provision in contract as to notice, in view of purpose of Interstate Commerce Act to prevent discrimination.—*Cudahy Packing Co. v. Chicago & N. W. Ry. Co.*, 201 S.W. 596.

**App.** 1918. None of the provisions of bill of lading on interstate shipment can be waived by the parties, the bill of lading having been made pursuant to the Carmack Amendment.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865, 199 Mo. App. 589, certiorari denied 39 S. Ct. 19, 248 U. S. 577, 63 L. Ed. 429.

**App.** 1919. A special contract entered into at St. Louis, Mo., between a shipper and a carrier, whereby the carrier was to divert or re consign a shipment of potatoes at Pittsburgh, Pa., to Chicago, Ill., by wire, so as to have it go by particular train arriving at Chicago on a particular date, was an agreement for special services prohibited by Interstate Commerce Act as amended by Elkins Act, for breach of which no recovery could be had by the shipper.—*Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531, 201 Mo. App. 609.

**App.** 1920. Where the posted and published tariff rates of railroad made no provision for heating the car, an agreement by the railroad to heat the car for transportation of potatoes would have been illegal, as an agreement to furnish special and discriminatory service, under Interstate Commerce Act, notwithstanding Cummins Amendment of 1915, making interstate carriers liable for loss, damage, or injury to property caused by such carrier or connecting carrier, despite limitation of liability; such amendment not affecting the requirement that the loss, to render carrier liable, shall have been caused by the carrier.—*Clemons Produce Co. v. Den-*

*ver & R. G. R. R.*, 219 S.W. 660, 203 Mo. App. 100.

The heating of car for transportation of potatoes and the furnishing of attendant are special facilities not common to the act of transportation, and cannot be furnished, in absence of provision therefor in the posted and published rates approved by Interstate Commerce Commission.—*Id.*

**App.** 1920. An agreement between shipper and carrier that corn should be transported from a point in the United States into Mexico without reloading into other cars held not discriminatory.—*Brunswig v. Bush*, 221 S.W. 759, certiorari dismissed *Bush v. Brunswig*, 41 S. Ct. 9, 254 U. S. 660, 65 L. Ed. 402.

**App.** 1928. Prohibition against unjust discrimination between shippers precluded carrier's waiver of timely written notice of claim for nondelivery of express shipment (Interstate Commerce Act, as amended by Cummins Amendment [49 USCA § 20, par. 11]).—*Mt. Arbor Nurseries v. American Ry. Express Co.*, 300 S.W. 1051, 220 Mo. App. 241.

### 32 (2 ½). — Distribution of cars.

*See explanation, page iii.*

### 32 (2 ½). — Charges in general.

**Sup.** 1917. An order of the Public Service Commission, made on complaint of traveling salesman, fixing a different and lesser charge for storage of baggage on certain days for such travelers than was fixed by general order governing charges on baggage of other persons, was void as discriminatory against interstate travelers.—*Atchison, T. & S. F. Ry. Co. v. Public Service Commission of Missouri*, 192 S.W. 460.

### 32 (2 %). — Rebates.

**Sup.** 1920. A contract, letting out part of railroad construction work, whereby the contractor agrees with the subcontractor that the railroad shall refund to the subcontractor freight charges and fares paid on laborers engaged in the work, is not unlawful and unenforceable as providing for a "rebate."—*Baker v. J. W. McMurry Contracting Co.*, 223 S.W. 45, 282 Mo. 685.

### 32 (2 ½). — Switching and switching charges.

*See explanation, page iii.*

### 32 (2 %). — Compensating shippers for services.

*See explanation, page iii.*

←32 (2%). — Carriage of livestock.

**App. 1920.** Provisions of a bill of lading covering an interstate shipment of live stock requiring the giving and filing of notice and of a verified claim within times specified could not be waived, as this would open the door to discrimination and favoritism.—*Cunningham v. Missouri Pac. R. Co.*, 219 S.W. 1003.

**App. 1920.** A station agent of a railroad operating under federal control has no authority to make an absolute and unconditional contract to have cattle cars ready at a certain place or date, irrespective of the government's needs or of general service to the public; such a contract being special and discriminatory, and violative of the Commerce Act.—*Underwood v. Hines*, 222 S.W. 1037.

**App. 1921.** If a carrier of live stock agreed to carry the stock without unloading past the 28-hour limit imposed by 28-Hour Law, § 1, and past the regular unloading place for such period, it was a special agreement imposing special duties which would be void as a discrimination in the absence of a corresponding rate therefor.—*Bradford v. Hines*, 227 S.W. 889, 206 Mo. App. 582.

←32 (2%). — Carriage of passengers.

**App. 1914.** Under Interstate Commerce Act, § 2, prohibiting unjust discrimination in rates and fares by carriers, and section 3, prohibiting undue preferences, a passenger, regardless of the arrangement he may have had with the ticket agent, had no right to be transported over a longer route at the tariff rate applicable to a shorter route between two points.—*Ligon v. St. Louis & S. F. Ry. Co.*, 168 S.W. 647, 184 Mo. App. 187.

←32 (3). Justification.

*See explanation, page iii.*

←33. Facilities to connecting lines.

*See explanation, page iii.*

←34. Judicial proceedings to enforce regulations.

*See explanation, page iii.*

←35. Contracts in violation of regulations.

**Sup. 1900.** Where a consignee of goods shipped from another state sues the common carrier for the value of goods lost in transit, his right to recover their value cannot be limited by the contract of shipment, which provided that in consideration of reduced rates the valuation of the property shipped should

not exceed \$5 per 100 pounds, and the carrier's liability should not exceed that amount, since such contract violates Interstate Commerce Act, § 2, forbidding special rates.—*Ward v. Missouri Pac. Ry. Co.*, 58 S.W. 28, 158 Mo. 226.

**Sup. 1917.** Carrier's agreement to give bonus equal to one-half of amount of freight bills, in consideration of which lumber company constructed mills, violated Interstate Commerce Act, §§ 2, 3, 6, as amended by Elkins and Hepburn Acts.—*Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 194 S.W. 281, 270 Mo. 629, L. R. A. 1918A, 768.

The fact that a carrier violated Interstate Commerce Act, § 6, requiring posting of freight rates, would not validate its contract, violating sections 2 and 3, prohibiting discriminating freight rates.—*Id.*

**Sup. 1917.** Provisions of contracts for interstate shipment of live stock, requiring written notice of claim for damages, as condition precedent to right to recover for loss or injury, are valid.—*Bilby v. Atchison, T. & S. F. Ry. Co.*, 199 S.W. 1004.

Contracts for interstate shipment of live stock cannot exempt carrier from liability for losses occasioned by own negligence.—*Id.*

Where contract on interstate shipment of stock required written notice of claim for damages as condition precedent to right to recover, failure to show compliance defeated recovery; there being consideration for such contract in reduced rate, it being proper under schedule of rates filed with Interstate Commerce Commission.—*Id.*

**Sup. 1919.** A shipper's agreement to allow a carrier to charge rates conflicting with Const. art. 12, § 12, prohibiting charging more for short than long hauls, does not estop him from later contesting the legality of such rates.—*Missouri Southern R. Co. v. Public Service Commission*, 214 S.W. 379, 279 Mo. 484.

**App. 1911.** Where a freight rate has been duly fixed by the Interstate Commerce Commission and posted by a railroad company a lesser rate contracted for between the shipper and a company, whether intentional or through mistake, is not binding, and the company can hold the freight until the legal rate is paid.—*Sutton v. St. Louis & S. F. R. Co.*, 140 S.W. 76, 159 Mo. App. 685.

**App. 1912.** A shipper is properly required to pay the full freight rate, estab-

lished under the interstate commerce law, though the carrier has through mistake contracted to carry at a lesser rate.—*Dunne & Grace v. St. Louis & S. W. Ry. Co.*, 148 S.W. 997, 166 Mo. App. 372.

**App. 1913.** Under the Interstate Commerce Act making it unlawful for a common carrier to receive a different compensation than specified in its public schedules of rates, or to make any rebate or discrimination, a carrier cannot contract for a different rate, directly or indirectly, as by payment under a mistake of fact as to weights, etc., and settlement of such mistake.—*St. Louis Southwestern Ry. Co. of Texas v. Spring River Stone Co.*, 154 S.W. 465, 169 Mo. App. 109.

**App. 1916.** Railroad could not by special contract with shipper of coal or otherwise bind itself to deviate from established rate per ton, between certain points, duly promulgated and in effect during certain period.—*Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co.*, 190 S.W. 650, 196 Mo. App. 154.

**App. 1919.** No oral agreement as to interstate shipments can be given a prevailing effect which will be contrary to filed tariff schedules.—*Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531, 201 Mo. App. 609.

**App. 1925.** Special instructions, as to delivery of express shipment, not binding on company, in view of Interstate Commerce Act.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

**App. 1925.** Railroad cannot contract to furnish cars for interstate shipments.—*Williams v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 935, 217 Mo. App. 662.

**App. 1926.** Contract to furnish cars on certain day imposes greater obligation than tariff implies, in that due diligence would not excuse breach, and hence is illegal preference, though no preference actually resulted.—*Dollinger v. Missouri Pac. R. Co.*, 282 S.W. 1047.

**App. 1928.** Carriers must contract for shipment according to law and rate schedules filed with Interstate Commerce Commission (Hepburn Act, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Hunter v. American Ry. Express Co.*, 4 S.W. (2d) 847.

### 36. Damages for violations of regulations.

**App. 1914.** Under the laws regulating interstate commerce, a shipper cannot recov-

er for the negligence of a railroad agent or clerk in quoting freight rates for interstate shipments, or in showing the shipper the wrong rate sheet.—*Sloop v. Delano*, 170 S.W. 385, 182 Mo. App. 299.

37-38(8). See explanation, page iii.

### 37. Penalties for violations of regulations.

37 (1). In general.

37 (2). Carriage of live stock.

37 (3). — Connecting carriers.

37 (4). — Amount and computation.

37 (5). Actions.

37 (6). Pleading.

37 (7). Evidence.

37 (8). Trial.

### 38. Offenses.

38 (1). In general.

38 (2). Carriage of live stock.

38 (3). Discrimination and overcharge.

38 (4). Jurisdiction and venue.

38 (5). Indictment and information.

38 (6). Evidence.

38 (7). Trial.

38 (8). Punishment.

## II. CARRIAGE OF GOODS.

Carriage of live stock, see post, 203-231.  
Regulation by state railroad commission, see ante, 10.

Who are common carriers, see ante, 4.

### (A) DELIVERY TO CARRIER.

Delivery of passenger's baggage, see post, 393.

### 39. Duty of carrier to receive and transport goods.

Duty to receive live stock for transportation, see post, 206.

**Sup. 1847.** Where a carrier is prohibited from carrying money, or it is the usage of trade not to carry money, if a person acquainted with the prohibition or usage delivers money to the carrier, it will not be responsible for loss of money.—*Chouteau v. The St. Anthony*, 11 Mo. 226.

**App. 1901.** A common carrier is bound to accept all goods offered him within the course of his employment, and he is liable to an action in case of refusal.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

**App. 1906.** While, under ordinary conditions, a railroad is bound to accept freight tendered it, an impending flood of such a character as to fall properly within the legal definition of an act of God, and which threatened with inundation defendant's railroad tracks, was a sufficient excuse to justify defendant in refusing plaintiff's shipment.—*Gray v. Wabash R. Co.*, 95 S.W. 983, 119 Mo. App. 144.

**App. 1916.** Although, under Interstate Commerce Act, defendant would ordinarily be required to take interstate shipment, it might refuse to do so unless shipper would make it subject to delay on account of a bridge which was out, if it notified plaintiff before accepting shipment.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1917.** Rev. St. 1909, §§ 3104, 3107, 3111, does not require a carrier to accept and transport and deliver freight where this would subject it or its agent to a penalty under the law.—*Gum v. St. Louis & S. F. Ry. Co.*, 198 S.W. 494.

**App. 1924.** Generally, common carriers are bound to receive goods which are offered by owners or their agents for transportation and to carry them for a just compensation.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

#### ⚡40. Duty to furnish shipping facilities or means of transportation.

Action for failure to furnish cars, see post, ⚡45.

Discrimination, see ante, ⚡32(2).

Excuses for delay, see post, ⚡44.

**Sup. 1883.** It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered; but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected.—*Dawson v. Chicago & A. R. Co.*, 79 Mo. 296.

**Sup. 1909.** Independent of statute, a railroad is under a legal duty to furnish freight cars to shippers when requested.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 116 S.W. 530, 216 Mo. 658.

**App. 1910.** A common carrier is under a legal duty to supply patrons with cars to promptly move such freight as may be expected, according to the usual volume of business offered for shipment, and if timely de-

mands are made for cars, and the carrier fails to furnish them, without lawful excuse, he is answerable for the proximate damage sustained by the shipper.—*Cronan v. St. Louis & S. F. R. Co.*, 130 S.W. 437, 149 Mo. App. 384.

**App. 1922.** In absence of a special contract to furnish cars on a particular date, a railroad engaged as a common carrier in the shipment of any particular class of articles or property is bound to furnish suitable cars for such shipment on reasonable notice whenever it can do so by exercise of reasonable diligence and without jeopardy to its business as such common carrier; the question of what constitutes reasonable notice depending on the circumstances of the particular case.—*Howell v. Hines*, 236 S.W. 886.

A carrier owes the same duty to all shippers at any one station as it does to shippers at other stations of the same standing and rank, and the rights of all shippers applying for cars under the same circumstances are necessarily equal.—*Id.*

**App. 1924.** Common carriers are public servants, and must equip themselves to take care of normal traffic with reasonable dispatch and efficiency.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

Carrier must, when application for cars is made, advise intended shipper of conditions that might cause a delay, and if agents have not so advised shipper and secured his consent, express or implied, to such delay, and damages result therefrom, carrier is liable.—*Id.*

**App. 1925.** Duty of common carriers at common law stated.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

Carriers' duty to furnish cars is not absolute.—*Id.*

#### ⚡41. Acts constituting delivery to and acceptance by carrier.

Commencement of liability, see post, ⚡113.

**App. 1893.** A railroad company cannot be regarded as having received and as in actual possession as bailee of ties, lumber, wood, etc., that may have been placed onto right of way along its line for it, or for future shipment on its cars.—*Baker v. Kansas City, C. & S. Ry. Co.*, 52 Mo. App. 602.

**App. 1911.** Where a carrier places one in a depot, and holds him out to the public as



qualified to receive shipments, a delivery to and an acceptance by him is a delivery to the carrier.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

**App. 1926.** Delivery to carrier at customary place or place designated by contract held sufficient.—*First Nat. Bank v. Missouri Pac. Ry. Co.*, 278 S.W. 1075, 220 Mo. App. 941.

42. **Effect of delivery and acceptance.**

**Sup. 1847.** Common carriers may be carriers of money as well as of goods if such carriage is sanctioned by the usage of trade; but where no usage is shown, the receiving of money and the agreement of the carrier to deliver raises the presumption that such is his customary employment.—*Chouteau v. The St. Anthony*, 11 Mo. 226.

43. **Failure or refusal to receive goods.**

*See explanation, page iii.*

44. **Failure or refusal to furnish shipping facilities or means of transportation.**

Release of liability for failure to furnish cars, see post, 156(1).

**App. 1906.** Where the capacity of a carrier is not overtaxed, a shipper demanding cars need not in order to recover for failure to furnish cars, give notice to the carrier of the danger of the goods becoming injured unless shipped without delay.—*Hoffman Heading & Stave Co. v. St. Louis, I. M. & S. Ry. Co.*, 94 S.W. 597, 119 Mo. App. 495.

**App. 1910.** An extraordinary increase of business, which could not have been anticipated by using judgment and diligence, and which prevents a railroad from furnishing cars, is a defense to an action for failure to furnish the cars.—*Shoptaugh v. St. Louis & S. F. R. Co.*, 126 S.W. 752, 147 Mo. App. 8.

**App. 1910.** A carrier is not liable for delays caused by a sudden increase of business that could not be anticipated by ordinary prudence and foresight.—*Baker v. St. Louis & S. F. R. Co.*, 129 S.W. 436, 145 Mo. App. 189.

A carrier may not escape liability for delay in furnishing cars on the ground of a car famine resulting from an extension of the carrier's mileage and a natural increase in business.—*Id.*

**App. 1910.** An extraordinary increase of business, which could not have been anticipated by diligence, and which prevents a rail-

road from furnishing cars, is a good defense to an action for its failure to furnish the cars; and, where a carrier is reasonably equipped for ordinary conditions of business, the fact of an unusual and unexpected pressure of business will excuse the delay, provided the shipper is notified of the fact at the time of the shipment; but such fact is no excuse when the carrier, with full knowledge of it, accepts goods for transportation without informing the shipper of the true situation.—*Dillender v. St. Louis & S. F. R. Co.*, 130 S.W. 107, 149 Mo. App. 331.

**App. 1910.** A common carrier is under a legal duty to supply patrons with cars to promptly move such freight as may be expected, according to the usual volume of business offered for shipment, and if timely demands are made for cars, and the carrier fails to furnish them, without lawful excuse, he is answerable for the proximate damage sustained by the shipper.—*O'ronan v. St. Louis & S. F. R. Co.*, 130 S.W. 437, 149 Mo. App. 384.

It is the duty of the carrier, when applied to for cars, to advise the shipper of the situation and circumstances which are likely to occasion any unreasonable delay.—*Id.*

Where the agents of a common carrier told plaintiff to get his timber out of the forest, and that cars would be furnished to take it to market, and he was not notified at any time that the carrier would be unable to furnish cars on account of an unreasonable and unexpected press of business, it was no defense to an action for failure to furnish the cars to show an unusual and unexpected press of business.—*Id.*

**App. 1921.** A rule of the railroad during the war that shipper must load cars within 24 hours had no application in an action for damages for failure to furnish a car on Tuesday, in compliance with an order for a car to be set in at a station to be coopered on Monday and loaded the day following, and agreement to do so, it appearing that the car was placed the previous Saturday and, after being coopered by plaintiff on Monday, was withdrawn on Tuesday, the day on which the shipper ordered it for loading and when he was ready to do so.—*Bartlett v. Missouri Pac. R. Co.*, 230 S.W. 660.

**App. 1925.** Carrier must give notice to be excused from liability for failure to furnish cars.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

**App. 1925.** Carrier failing to furnish cars as ordered within reasonable time is liable for breach of duty.—*Williams v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 935, 217 Mo. App. 602.

**App. 1925.** Contract to furnish a car within a specified time is valid, and failure to do so and ground that it was prevented by something beyond carrier's control no defense.—*German v. Chicago, M. & St. P. Ry. Co.*, 276 S.W. 1041.

—45. **Actions for refusal to receive or transport goods, or furnish facilities.**

**Sup. 1887.** Plaintiff sued to recover damages of defendant for a loss of profits on a contract to furnish railroad ties, because defendant "refused or failed to furnish him reasonable, proper, and fair shipping facilities." There was evidence that plaintiff was crowded out of the tie yard by another person shipping ties, and had to handle his ties twice, and gave up the contract; but there was no evidence that this person was an agent of defendant. *Held*, that a demurrer to the evidence should have been sustained.—*Spurlock v. Missouri Pac. Ry. Co.*, 6 S.W. 349, 93 Mo. 530.

**Sup. 1920.** Where a beverage was shipped in half barrels of a kind commonly used for the shipment of beer and bearing internal revenue stamps required to be placed on beer so shipped, and the bill of lading recited that the contents were unknown to the carrier, but at the shipper's instance also described the beverage as unfermented, nonalcoholic, carbonated beverages. It was a question for the jury whether the carrier was justified in refusing to transport the beverage into a prohibition state, and the court could not declare as a matter of law that it was justified because the shipment resembled an unlawful shipment.—*State ex rel. Pabst Brewing Co. of Milwaukee, Wis., v. Ellison*, 226 S.W. 577, 286 Mo. 225.

Whether a carrier in a specific instance believed that a shipment was of an unlawful character and whether it was reasonably justified in so believing are questions of fact for the decision of the jury.—*Id.*

**App. 1906.** An instruction that plaintiff, a shipper of cattle, was not entitled to recover for defendant's failure to furnish cars for the shipment of plaintiff's stock "at any specified time," did not conflict with an instruction authorizing plaintiff to recover if defendant failed to furnish cars ordered within a reason-

able time.—*Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211.

**App. 1906.** Where, in an action against a carrier for failure to furnish cars, the evidence showed usage recognized by the carrier of notifying its conductors to furnish cars when goods were ready to be shipped, and that plaintiff had notified the conductors to furnish cars, and had also notified a commercial freight agent to furnish cars, an instruction that unless plaintiff notified the carrier's superintendent that goods were ready for shipment there could be no recovery was properly refused.—*Hoffman Heading & Stave Co. v. St. Louis, I. M. & S. Ry. Co.*, 94 S.W. 597, 119 Mo. App. 495.

There is no variance between the allegation of a petition in an action against a carrier for failure to furnish cars that plaintiff had on hand at a station for shipment in the month of July a stated quantity of logs, that he demanded cars to load them, and that the carrier failed to furnish cars, and the proof that the logs remained at the station until November, while plaintiff was vainly requesting cars; the date alleged in the petition being immaterial.—*Id.*

**App. 1910.** Under Rev. St. 1899, § 592 (Ann. St. 1906, p. 612), requiring the petition to contain a plain and concise statement of the facts constituting a cause of action, a petition, alleging that during the four months from July to October, inclusive, plaintiff offered for shipment 120,000 feet of oak logs of the value of \$1,920 and 60,000 feet of cypress logs of the value of \$840 from a certain station, and asked for cars, but that defendant railroad failed to furnish them, and that in consequence the logs became damaged, etc., stated a case for not furnishing cars to haul any of the logs during the months named.—*Shoptaugh v. St. Louis & S. F. R. Co.*, 126 S.W. 752, 147 Mo. App. 8.

In an action against a railroad for failure to furnish cars to transport plaintiff's logs allegations of the value of the two species of logs and a depreciation in value during the period they lay at the station for lack of cars were sufficient to enable defendant to prepare its defense so far as the measure of damages was concerned, and it was not entitled to require plaintiff to allege the market prices either at such station or at the intended destination.—*Id.*

In an action against a railroad for failure to furnish cars to transport plaintiff's logs, plaintiff need not designate in his peti-

tion the character of cars required; defendant being presumed to know what kind were needed.—Id.

In an action against a railroad for failure to furnish cars to transport plaintiff's logs, where plaintiff did not know from the first that he could not ship, that after discovering such fact he continued to haul logs to the station was not a defense, but cause only for denying redress to the extent he increased his damage by accumulating logs after he knew that cars would not be available.—Id.

**App. 1910.** In an action against a carrier for failure to furnish plaintiff with cars, evidence *held* sufficient to make it a question for the jury whether there was such a sudden and unusual increase of business and demand for cars over defendant's road as to release it from its liability for failure to furnish the cars.—Dillender v. St. Louis & S. F. R. Co., 130 S.W. 107, 149 Mo. App. 331.

In an action against a carrier for failure to furnish cars, evidence *held* sufficient to show that a judgment of \$500 for plaintiff was not excessive.—Id.

**App. 1910.** In an action against a common carrier for failure to furnish cars to ship timber, where the defense was made that there was an unusual volume of traffic, plaintiff was properly allowed to prove by other shippers that in the seasons preceding the one in question there was a car shortage on defendant's road, in the district from which plaintiff was shipping.—Cronan v. St. Louis & S. F. R. Co., 130 S.W. 437, 149 Mo. App. 384.

In an action against a common carrier for failure to furnish cars to ship timber, where the evidence showed that defendant at no time notified plaintiff it could not furnish cars because of an unexpected rush of business, but encouraged him in getting out his timber and promised to furnish cars to ship it, a declaration of law that if there was a sudden and unexpected increase in defendant's business or if high water delayed defendant in handling its business it was not liable whether it notified plaintiff of this condition or not was more liberal to defendant than was justified.—Id.

In an action against a common carrier for failure to furnish cars to ship timber, where the uncontradicted evidence showed that defendant agreed to furnish at least one car a day and several times told plaintiff

that cars would be furnished, and that when he inquired as to the situation and notified defendant that he was keeping a large crew of men on hand at a large expense to have them ready to load cars, defendant notified him that the cars would be furnished, the court was justified in refusing to declare as a matter of law, that there was no evidence of an agreement to furnish cars.—Id.

In an action against a common carrier for failure to furnish cars to ship timber, evidence *held* to support a judgment for plaintiff.—Id.

**App. 1915.** A shipper was not entitled to a mandatory injunction requiring an express company to deliver liquor shipments C. O. D., since it was compelling the express company to contract against its will in a matter having nothing to do with its duty as a common carrier.—Danciger v. American Express Co., 179 S.W. 797, 192 Mo. App. 172.

**App. 1916.** Under Rev. St. 1909, § 3116, prospective shippers who made verbal demand upon a railroad for cars which were not furnished could recover for breach of the road's common-law duty to furnish them, although they did not give the written notice required by section 3108 as a condition to recovering the statutory penalty.—Raper v. Lusk, 181 S.W. 1032, 192 Mo. App. 378.

**App. 1923.** If a double-decked car furnished a shipper was not suitable car for the transportation of hogs, nor the kind in general use, then the furnishing of the car was the same as furnishing no car, and there was no failure of proof under a petition alleging that no car was furnished.—Vitt v. Wabash Ry. Co., 251 S.W. 734.

**App. 1925.** Whether beverage which carrier refused to ship into dry state was beer, and was properly iced and preserved until examined, *held* for jury.—Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co., 273 S.W. 424, 221 Mo. App. 338.

Carrier receiving shipment cannot set up deception by appearance as defense to action for refusal to ship into dry state.—Id.

Whether shipment of beer into state was unlawful at time of carrier's refusal to do so *held* for jury.—Id.

**App. 1925.** Finding that carrier not negligent in failing to furnish car not warranted.—German v. Chicago, M. & St. P. Ry. Co., 276 S.W. 1041.

Petition *held* to allege a cause of action for carrier's negligent failure to provide a car on reasonable notice.—*Id.*

**(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.**

Carriage of live stock, see post, 4207.

Limitation of liability, see post, 4147-168, 180.

As carrier of live stock, see post, 4218(3).

Presentation of bill of lading or receipt on delivery of goods, see post, 483.

Provisions as to charge, see post, 4192.

Provisions requiring notice of loss, see post, 4159.

Receipts and checks for passenger's baggage, see post, 4394.

Special contracts—

As to amount of charges, see post, 4192.

For through transportation, see post, 4173.

For transportation of live stock, see post, 4207.

For transportation of passengers, see post, 4258.

**446. What law governs.**

Ordinarily a shipment contract is governed by the laws of the state where it is made.—*Sup.* 1892. *Otis Co. v. Missouri Pac. Ry. Co.*, 20 S.W. 676, 112 Mo. 622;

*App.* 1903. *Herf & Frerichs Chemical Co. v. Lackawanna Line*, 73 S.W. 346, 100 Mo. App. 164; (1904) *Nenno v. St. Louis & S. F. R. Co.*, 80 S.W. 24, 105 Mo. App. 540; (1906) *Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25; (1911) *Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

*App.* 1890. The validity and interpretation of a contract of affreightment made and chiefly to be performed in one state for the carriage of goods to another state is to be governed by the law of the state where made.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

*App.* 1908. A contract made in New York by an express company to carry goods to a point in Missouri is governed by the laws of New York.—*Townsend & Wyatt Dry Goods Co. v. United States Express Co.*, 113 S.W. 1161, 133 Mo. App. 683.

*App.* 1915. Where an agreement concerning further transportation over the line of a connecting carrier was made after the goods had reached the state of Arkansas, and

they were only to be transported to another point in that state, the local laws govern.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

*App.* 1920. Contracts for interstate shipments are governed by the acts of Congress, the agreement of parties, and the common-law principles accepted and enforced in federal courts.—*Clemons Produce Co. v. Denver & R. G. R. R.*, 219 S.W. 660, 203 Mo. App. 100.

**446½. Duty to give bill of lading or receipt.**

*See explanation, page iii.*

**447. Authority of agents and employees.**

Agency between connecting carriers, see post, 4169-187.

Authority to contract for carriage of passenger, see post, 4244.

Authority to contract for transportation of live stock, see post, 4207.

Notice to assignee of bill of lading, see post, 457.

Rights of transferees of bills of lading, see post, 457.

**447 (1). In general.**

*Sup.* 1864. In order to render a railroad corporation liable for failure to deliver goods, which the plaintiff claimed to have delivered to the agent of the company, at a distance from the line of the railroad, to be carried by him to the road, and thence transported on its line, the authority of such agent to bind the corporation must be shown, as the transaction was distinct from the general objects of the company.—*Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo. 84.

*Sup.* 1872. Plaintiff delivered a number of articles to a railroad to be carried to a point on defendant road. In the action, which was for loss of part of the goods, a writing was introduced acknowledging the receipt of all the goods from a transfer company, and the freight agent of the first road testified that all the goods were delivered to defendant. At the point of destination, defendant's agent delivered part of the goods to plaintiff. *Held* sufficient to show that the goods were received by defendant, though there was no proof of the agency and handwriting of the one signing the receipt.—*Landes v. Pacific R. R.*, 50 Mo. 346.

*Sup.* 1883. Directions given by the baggageman of a railroad company to a porter bringing baggage to the depot as to what to

do with it, the baggageman at the time being away from his post of duty engaged in the prosecution of his own business, do not in any way bind the company so as to fix its liability for a subsequent loss thereof.—*City of Chillicothe ex rel. Matson v. Raynard*, 80 Mo. 185.

**App. 1880.** In an action against a railroad company for the loss of goods, evidence held sufficient to show that one who was acting as chief clerk to the general freight agent of defendant had authority from defendant to make the contract in question for the transportation of plaintiff's goods.—*Barrett v. Indianapolis & St. L. R. Co.*, 9 Mo. App. 226.

**App. 1895.** Where a station agent had authority to contract for furnishing cars to a shipper at another station, a shipper may presume that he has power to contract for the receiving and shipment of freight as well, and hence his contract will bind the company in the absence of notice to the shipper of any limitation on his authority.—*Miller v. Chicago & A. Ry. Co.*, 62 Mo. App. 252.

**App. 1897.** Where a station agent, clothed with the power and whose duty it is to receive and forward freight, makes a contract within the scope of his apparent authority, he binds the company he represents, though he may have exceeded his authority; and when the company seeks to escape from liability under the contract on the ground that the agent, though apparently authorized to make it, had no authority in fact, it must show that the party with whom the contract was made had knowledge of the fact that the agent was acting beyond his authority.—*Gann v. Chicago Great Western Ry. Co.*, 72 Mo. App. 34.

**App. 1906.** Evidence in an action against a carrier for failure to furnish cars examined, and held to justify a finding that a request for cars made to the carrier's commercial freight agent was binding on the carrier, as within the apparent scope of the agent's authority.—*Hoffman Heading & Stave Co. v. St. Louis, I. M. & S. Ry. Co.*, 94 S.W. 597, 119 Mo. App. 495.

**App. 1911.** An agent of a railroad company, while bound to receive goods for transportation, has the right to limit his company's liability to liability for negligence on its own line.—*Miller v. Missouri, K. & T. Ry. Co.*, 138 S.W. 902, 157 Mo. App. 638; *Steckdaub v. Same*, 138 S.W. 904.

**App. 1912.** An agent of a railroad company in charge of both its freight and ticket offices and conducting its business in both departments at a particular place has apparent authority to accept checks in payment of freight charges.—*Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273.

**App. 1912.** A local station agent's authority extends only to the control of the carrier's business at his own station.—*Hunter v. St. Louis & S. F. R. Co.*, 150 S.W. 733, 167 Mo. App. 624.

**App. 1921.** A contract entered into by a station agent in behalf of his company with a shipper to furnish cattle cars held good.—*Thee v. Wabash Rty. Co.*, 233 S.W. 959, 208 Mo. App. 200.

47 (2). Authority to make contract to carry goods beyond carrier's line.

**Sup. 1879.** A carrier is not bound by a contract of its station agent to transport property beyond the line of its own road, where such contract was made without express authority to do so, and against the explicit directions to the contrary from the station agent's superior officer, the general freight agent; there having been no previous dealings between the shipper and the carrier from which the shipper might reasonably have inferred such authority, and the carrier not having held itself out as a common carrier to a point beyond its line of road.—*Grover & Baker Sewing Mach. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, 35 Am. Rep. 444.

**App. 1886.** A local freight agent has no power to bind his company by contract covering any part of transportation over another line, unless such authority has been expressly conferred upon him by the company or can be implied from his previous acts and conduct.—*Turner v. St. Louis & S. F. Ry. Co.*, 20 Mo. App. 632.

**App. 1890.** An agent, employed by a railway company to solicit business, is not authorized to enter into a contract for the transportation of goods beyond the company's own lines, unless such authority has been expressly conferred on him, or unless it is implied from his previous conduct.—*Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

**App. 1892.** In an action against a railroad company on a contract for the transportation of goods to a point beyond its own line, plaintiff must show the authority of the station agent who made the contract to enter

into such an undertaking.—*Patterson v. Kansas City, Ft. S. & M. R. Co.*, 47 Mo. App. 570.

**App. 1894.** Prima facie a station agent can only bind the railroad company in contracts to the end of its road, and hence it must be affirmatively shown that he had authority to bind it beyond the end of the line.—*Minter v. South Kansas Ry. Co.*, 56 Mo. App. 282.

**App. 1903.** A station agent's authority to bind a railroad in a contract of carriage to a point on the line of a connecting carrier must be proved in order to hold his company liable for loss or damage occurring on the line of the connecting carrier.—*Faulkner v. Chicago, R. I. & P. Ry. Co.*, 73 S.W. 927, 99 Mo. App. 421.

The authority of a station agent to bind a railroad on a contract of carriage to a point beyond its terminus may be inferred from a previous course of dealing between the shipper and the carrier.—*Id.*

**App. 1910.** If two or more carriers are copartners for transporting freight over their respective lines, a contract made by the agents of one of them with the shipper binds them all, in absence of a stipulation therein to the contrary.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

**App. 1916.** A traveling fast freight soliciting agent, soliciting freight at points not on the carrier's lines, is a general agent, with power to bind the carrier to furnish cars at such points.—*Kissell v. Pittsburgh, Ft. W. & C. Ry. Co.*, 188 S.W. 1118, 194 Mo. App. 346.

Where the carrier, not being required by law to furnish cars at a point off its lines and on those of a connecting carrier, did so furnish them, it ratified its agent's contract so to furnish them, since it must have known that it furnished such cars under the contract, as in fact it was doing.—*Id.*

#### 48. Affixing revenue stamps to bill of lading or receipt.

See explanation, page iii.

#### 49. Validity of bill of lading or receipt.

**App. 1894.** A bill of lading issued by a railroad company purported to acknowledge the receipt of the property therein mentioned at a designated city. The evidence showed that the delivery of the merchandise was to a car, but that the car was not in the possession of the company, but was in the possession of

another corporation, and it never came into the possession of the company which issued the bill of lading. *Held*, that there was no sufficient delivery of the property to the company within the meaning of Rev. St. 1889, c. 18, prohibiting the issuing of bills of lading unless the property therein described shall have been actually received by the carrier issuing the bill.—*Ætna Nat. Bank v. Water Power Co.*, 58 Mo. App. 532.

Rev. St. 1889, c. 18, prohibiting the issuance of any bill of lading unless the property therein mentioned shall have been actually delivered to the carrier issuing the bill, and declaring a violation of the statute a criminal offense, and preserving to the injured party a civil action against the wrongdoer, prohibits the issuance of a bill of lading by a carrier unless the carrier has actually received the goods therein mentioned, and the delivery of a bill of lading issued by another carrier, properly indorsed, is not a sufficient delivery of the property.—*Id.*

**App. 1897.** Bills of lading are fraudulent and void when issued in direct violation of Rev. St. 1889, § 743, which requires that carriers shall not issue a bill of lading until the freight shall have been actually shipped and put on board and shall be at the time actually delivered to the car.—*Ætna Nat. Bank v. Union Pac. Ry. Co.*, 69 Mo. App. 246.

#### 50. Construction and operation of bill of lading.

Waiver of provisions as to notice as discrimination, see ante, 32(2).

#### 51. — In general.

**App. 1880.** Where plaintiff made a contract with the agent of defendant for the transportation of goods from D. in Missouri to New York, and the goods were delivered before any bill of lading was given, on the understanding that on their arrival at St. Louis a through bill to New York would be given, such agent had no right to insert any new term in the bill of lading, or to interpose a new party to the contract.—*Barrett v. Indianapolis & St. L. R. Co.*, 9 Mo. App. 226.

**App. 1896.** The effect of a bill of lading showing a general consignment of the goods is to vest the legal title thereto in the consignee.—*Evans Garden Cultivator Co. v. Missouri, K. & T. Ry. Co.*, 64 Mo. App. 305.

**App. 1914.** A bill of lading is both a receipt and a contract to carry.—*Morrison*

Grain Co. v. Missouri Pac. Ry. Co., 170 S. W. 404, 182 Mo. App. 339.

52. — As a receipt.

52 (1). In general.

Sup. 1845. A bill of lading partakes of the nature of a receipt and a contract.—*The Missouri v. Webb*, 9 Mo. 193.

App. 1910. A bill of lading issued by a railroad company, returned to it on its demand when the shipper requested the goods to be stopped in transit, was prima facie evidence that the company received the goods for shipment.—*Seigfried v. Chicago, B. & Q. R. Co.*, 126 S.W. 798, 147 Mo. App. 543.

App. 1911. A bill of lading fair on its face calling for the transportation of a car of lumber is prima facie proof of the carrier's receipt and acceptance of the lumber.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

52 (2). Effect as admission in respect to quantity or condition of goods.

App. 1918. While recital of bill of lading of receipt of carload of agricultural implements is not conclusive that three certain implements were in the car, in connection with evidence that such articles were placed in the car, it is prima facie proof that they were in the car.—*John Deere Plow Co. v. American Express Co.*, 203 S.W. 488.

52 (3). Effect of custom.

See explanation, page iii.

53. — As a contract.

App. 1883. Where a receipt given by a carrier read: "Received from H. \$200. Same being for duties on one package of goods in New York custom house to be forwarded"—the word "forwarded" was not conclusive against the liability of the carrier as a common carrier.—*Fischer v. Merchants' Dispatch Transp. Co.*, 13 Mo. App. 133.

App. 1885. The bill of lading is the contract between the shipper and carrier, and where the direction for delivery in the bill of lading differs from that on the goods, the former will control.—*Moore v. Henry*, 18 Mo. App. 35.

App. 1895. Where goods were shipped under a bill of lading containing a blank space for the amount of freight rate guaranteed, which was not filled, and purported to be subject to the conditions and regulations

of the published tariff of the company, and then only to the terminus of its road, such bill of lading will be held to contain the whole contract, and hence, if plaintiff wished to rely on a previous agreement as to rates, it was for them to have its terms embodied in the bill of lading.—*Holten v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 204.

App. 1909. A receipt by a carrier for freight, which declares that the shipment shall be subject to the conditions of the bill of lading, makes the bill of lading a part of the contract of carriage.—*Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co.*, 120 S.W. 663, 140 Mo. App. 130.

App. 1909. An instrument reciting receipt by defendant carrier from plaintiff of the "following articles" to be delivered to plaintiff at destination, after which is a description of the articles, followed by the words "received subject to conditions of \* \* \* (defendant's) bill of lading," itself constitutes the contract, in the absence of evidence by either party of anything else in the way of a bill of lading having been made out, or any form in use having been agreed on as part of the contract.—*American Storage & Moving Co. v. Wabash R. Co.*, 123 S.W. 964, 146 Mo. App. 224.

App. 1915. A bill of lading is not a contract of shipment, but evidence thereof.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

App. 1927. Meaning of "reasonable despatch" provision of bill of lading cannot be shown by construction placed thereon by parties.—*Parsons v. Chicago, B. & Q. R. Co.*, 300 S.W. 324.

54. Negotiability and transfer of bill of lading.

55. — Negotiability and assignability.

Sup. 1869. In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.—*Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363.

Sup. 1922. 40 USCA § 87, providing that the insertion in an order bill of lading of the name of the person to be notified shall not limit the negotiability of the bill or constitute notice to a purchaser of any rights or equities of such person, applies only to contests with a purchaser of the bill, and not to contests between the carrier and the ship-

per, while the latter is still the holder and in possession of the bill.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88.

**App. 1882.** By the common law a bill of lading was a negotiable instrument, representing the title to the property named therein, which might be transferred from hand to hand by mere delivery, carrying to any transferee the title to the property.—*Ober v. Indianapolis & St. L. R. Co.*, 13 Mo. App. 81.

**App. 1895.** The word "nonnegotiable" stamped on the face of bills of lading in no wise destroys their assignability; the sole effect being to exempt such bills of lading from the provisions of Rev. St. 1889, § 745, in relation thereto.—*Midland Nat. Bank v. Missouri, K. & T. R. Co.*, 62 Mo. App. 531.

**App. 1907.** A bill of lading is assignable, such an assignment constituting in the law a complete legal delivery of the goods thereby evidenced to be in the hands of the carrier, as effectually as an actual sale and delivery thereof.—*Gratlot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

#### ☞56. — Indorsement or other transfer.

The delivery of a bill of lading for goods in the hands of a common carrier is sufficient to pass title to the goods without indorsement.

—**Sup. 1869.** *Davenport Nat. Bank v. Homcyer*, 45 Mo. 145, 100 Am. Dec. 363;

**App. 1903.** *American Zinc, Lead & Smelting Co. v. Markle Leadworks*, 76 S.W. 628, 102 Mo. App. 158.

**App. 1888.** Where a shipper indorses and delivers the bill of lading covering the shipment to another, he thereby parts with all his right to, and interest in, the shipment as effectually as if he had delivered the goods themselves, which thereupon become subject to the order of the indorsee, who may withhold them from, or deliver them to, the consignee named in the bill as he may direct.—*Missouri Pac. Ry. Co. v. McInney*, 32 Mo. App. 166.

**App. 1895.** A delivery of a bill of lading without indorsement for value transfers the property in the goods it covers, and hence an objection that bills of lading were delivered to plaintiff without the written indorsement of the holder is of no consequence.—*Midland Nat. Bank v. Missouri, K. & T. R. Co.*, 62 Mo. App. 531.

**App. 1903.** Where a bank furnished a stock buyer with means by paying his checks for the purchase price of stock purchased under an agreement that, as the stock was shipped, the bills of lading, with drafts for the proceeds, should be delivered to the bank, and that it should have \$2 per car for furnishing the money, the stock so purchased was the property of the buyer, and not of the bank.—*Clary v. Tyson*, 71 S.W. 710, 97 Mo. App. 586.

**App. 1914.** A bill of lading though non-negotiable represents the goods, and a sale of the goods coupled with the delivery of the bill of lading transfers possession of the goods.—*Long-Bell Lumber Co. v. Chicago, B. & Q. R. Co.*, 167 S.W. 1183, 181 Mo. App. 223.

**App. 1916.** Where a bill of lading for hay was taken to the order of the consignor providing for notice of a right of inspection by the buyer, held that a delivery of the bill by the bank to the buyer for the purpose of inspection was not a breach of duty by the bank, as it did not constitute a transfer of title.—*St. Joseph Hay & Feed Co. v. Missouri Pac. Ry. Co.*, 185 S.W. 1162.

**App. 1916.** In view of Rev. St. 1909, §§ 11956, 11957, bills of lading are transferable without indorsement for value and carry property in goods covered.—*Kinsolving v. State Savings & Trust Co.*, 190 S.W. 379, 195 Mo. App. 326.

#### ☞57. — Rights of transferee as against carrier.

**Sup. 1895.** Where a railroad company issues original shipper's order bills of lading, declaring that the consignment is in its possession, to be delivered only on their presentation, not conditioned to be void in case of delivery on duplicate bills issued for protection, the company will be liable on its original bills to one holding them as assignee for a valuable consideration, though it has already delivered the freight to the shipper on his presenting one of the duplicate bills.—*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 33 S.W. 521, 132 Mo. 492, affirming judgment 62 Mo. App. 531.

Where a railroad company issues original and duplicate shipper's order bills of lading, the original not conditioned to be void on delivery on the duplicate, custom and usage at the place of delivery of never delivering a consignment without surrender of the original bills, and of loaning money on such original bills, is not a factor in determining the liability of a railroad on such bills to a



bona fide holder thereof, by written assignment, as security for a loan, where the road has delivered the consignment to the shipper on presentation of the duplicate bill alone.—Id.

**App. 1890.** If Rev. St. 1889, § 745, changes the common-law rule to the effect that if a carrier delivers goods, even to the original owner when he is the consignee, or to the consignee himself, without the surrender of the bill of lading, it takes on itself the risk of a previous transfer of the bill of lading to some innocent party, it can have no application to a contract of shipment not made in the state, nor executed in whole or in part within the state.—Alabama Nat. Bank v. Mobile & O. Ry. Co., 42 Mo. App. 284.

**App. 1895.** Where grain was shipped over defendant's railroad under a bill of lading to shipper's order which was indorsed to the shipper's principal and by it transferred to plaintiff by delivery before the delivery of the grain to such principal, the plaintiff became owner of such grain, and hence the defendant was liable to plaintiff for failure to deliver.—Midland Nat. Bank v. Missouri, K. & T. R. Co., 62 Mo. App. 531.

**App. 1898.** Where a carrier itself issues a bill of lading he will not be permitted to say to the prejudice of an innocent holder that he never received the freight, and the act of the carrier's general agent is the act of the carrier itself, under Rev. St. 1889, §§ 743, 746, requiring that at the issuance of the bill of lading the grain shall be actually shipped and on board the cars of the carrier.—Smith v. Missouri Pac. Ry. Co., 74 Mo. App. 48.

In an action by an innocent holder of a bill of lading against the carrier on the ground that the bill of lading was delivered before the goods were received for transportation, it is no defense that the goods were in fact afterwards delivered to the carrier, but were then taken from it by a judgment in replevin, of all of which plaintiff had notice when the carrier did not receive the goods from or for the holder of the bill of lading or his transferee, plaintiff in this action.—Id.

**App. 1906.** A carrier's liability to one to whom bills of lading have been negotiated, for issuing the same before it had received the freight, in violation of Rev. St. 1899, § 5052, is not changed by its subsequent receipt thereof, the goods having been spoiled before their receipt.—Watkins Nat. Bank v. Cleveland, C. & St. L. Ry. Co., 93 S.W. 846, 117 Mo. App. 248.

**App. 1913.** A purchaser of goods shipped subject to the consignor's order, with draft attached, before honoring the draft, has no right to maintain replevin against the carrier to obtain possession of the goods.—Burgess v. St. Louis & S. F. R. Co., 161 S.W. 858, 176 Mo. App. 257.

**App. 1914.** In an action against a carrier for conversion of goods resold to plaintiff by the buyer to whom they were consigned, evidence held not to show the indorsement on the bill of lading was a forgery, but that it was made by another authorized to sign the name of the manager of the buyer.—Long-Bell Lumber Co. v. Chicago, B. & Q. R. Co., 167 S.W. 1183, 181 Mo. App. 223.

**App. 1915.** A pledgee of a bill of lading does not cease to be a party in interest to an action for conversion by the carrier, by giving the note, evidencing the debt secured, to another to hold as evidence merely of a transaction between the pledgee and him, not amounting to a sale of the note.—People's State Savings Bank v. Missouri, K. & T. Ry. Co., 178 S.W. 292, 192 Mo. App. 614.

Waiver by a pledgor of a bill of lading of conversion by the carrier does not affect the pledgee's right of recovery to the amount of its interests from the carrier.—Id.

The pledgee of a bill of lading is the proper party plaintiff for conversion of the shipment by the carrier.—Id.

As to the recovery above his interests by the pledgee of a bill of lading, for conversion by the carrier of the articles shipped, he stands to the pledgor in the relation of trustee of an express trust.—Id.

As incident to a pledge of a bill of lading, the pledgee, suing the carrier for conversion of the shipment, may recover not only the amount of debt secured, but expenses of the suit, though there can be no recovery for the pledgor, because of his waiver.—Id.

#### 58. — Rights and liabilities of transferee as to persons other than carrier.

**Sup. 1881.** The carrier, to which a shipment of whisky was delivered, issued triplicate bills of lading to the order of the shipper, and the vice president and general manager of the company furtively took one of the bills of lading from the desk of the secretary and sold the goods and made delivery, and at the same day, and about the same time, the secretary indorsed a bill of lading and drew

drafts against the goods to plaintiff, to whom the bill of lading and drafts were delivered, the delivery to plaintiff being as collateral security for a pre-existing indebtedness. *Held* that, as between the purchaser of the goods and plaintiff, the controlling question was the time when the bills were delivered, and the fact that the bill of lading was delivered to plaintiff as collateral security for a pre-existing indebtedness was immaterial.—*Skilling v. Bollman*, 73 Mo. 665, 39 Am. Rep. 537.

**Sup. 1925.** Seller of bills of lading, buyer's check for which was not paid, owned substituted bills issued buyer.—*Lewis v. James McMahon & Co.*, 271 S.W. 779, 307 Mo. 552.

Bank, taking substituted bills of lading from buyer, *held* charged with notice of seller's rights.—*Id.*

**App. 1878.** Plaintiff advanced money to enable a distilling company to continue business, and, on the preparation of a shipment of high wines, advanced a further sum to purchase revenue stamps, the distilling company delivering to plaintiff the bill of lading indorsed to the factors to whom the shipment was consigned, and also delivered drafts upon the factors for the proceeds. Thereafter an agent of the corporation sold a duplicate bill of lading to defendant, who took in good faith and without notice. *Held*, that the fact that the bill of lading was delivered to plaintiff in part to secure him for prior advances did not prevent him from acquiring title to the goods which was superior to that of defendant.—*Skilling v. Bollman*, 6 Mo. App. 76.

Where several bills of lading are assigned, the person who first gets one by legal title from the owner or shipper has the right to the consignment.—*Id.*

**App. 1890.** The delivery and transfer of a bill of lading for value is a symbolical delivery of the goods therein mentioned, and the effect of the transfer is to vest in the transferee whatever title in the goods the transferor had at the date of the assignment, and if the transferor had previously sold and delivered the goods to another, or had consented to the delivery by the carrier, the transferee of the bill of lading would obtain nothing by his purchase.—*Alabama Nat. Bank v. Mobile & O. Ry. Co.*, 42 Mo. App. 284.

**App. 1891.** Where a railroad company wrongfully delivers grain to the consignee notwithstanding the indorsement of the bill of lading by the consignor to a bank, the consignee, by retaining the grain, is equally

guilty with the railroad of the conversion.—*Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

By statute (Rev. St. 1889, § 744) and by the law merchant a bill of lading is a symbol of the goods in such a sense that a transfer thereof by indorsement and delivery passes to the transferee the transferor's title to the goods, and the consignee cannot, by wrongfully receiving the goods from the carrier, hold them for balance due on a general account from the consignor, where the latter has delivered the bill of lading for security for a draft to a bank which has advanced money thereon.—*Id.*

**App. 1903.** Where, on the shipment of a car load of stock, the bill of lading, though unindorsed, was delivered to a creditor of the owner with a draft on the consignee for the proceeds of the sale of the stock, such creditor thereby acquired a lien on the stock superior to the lien of a subsequent attachment.—*Clary v. Tyson*, 71 S.W. 710, 97 Mo. App. 586.

**App. 1906.** A principal consigned goods to a factor with power to sell or reconsign. A company reconsigned the goods to a third person, and a bank, in good faith, bought a draft drawn by the company against the new consignee, secured by a bill of lading, and took possession of the goods and retained the proceeds. *Held* that, if the company was empowered to reassign the goods and draw against them, the bank was not liable to the principal.—*Smith v. Jefferson Bank*, 97 S.W. 247, 120 Mo. App. 527.

**App. 1908.** Where plaintiff transferred to another the bills of lading for goods shipped defendant, defendant having ordered the goods from such other, and having no knowledge of plaintiff's understanding with him by which the bills were turned over to him, he could pay such other for the goods.—*Greenville Lumber Co. v. National Pressed Brick Co.*, 113 S.W. 236, 133 Mo. App. 217.

**App. 1910.** Transfer of a bill of lading for value by indorsement and delivery passes to the transferee whatever title the transferor has to the property at the time; and that only.—*Webster v. Bear*, 125 S.W. 815, 141 Mo. App. 531.

Plaintiff sold to F. 347 cases of eggs, and, at direction of F., shipped them consigned to defendant. In the same car plaintiff shipped 52 other cases of eggs, and attached to the bill of lading, accompanying the draft for the 347

cases drawn on F., a statement showing this fact, and that the 52 cases were consigned to defendant for sale on plaintiff's account. *Held*, that this was such precaution to notify the consignee of the facts that plaintiff was not estopped to assert title to the 52 cases against F.'s transferee of the bill of lading.—*Id.*

**App. 1912.** A draft attached to a bill of lading for corn purchased by defendant, payable to plaintiff, was prima facie notice to defendant that the price was claimed by plaintiff, and payment to the seller was unauthorized.—*Burton State Bank v. Pease-Moore Milling Co.*, 145 S.W. 508, 163 Mo. App. 135.

On deposit of a draft, to which a bill of lading for corn was attached, in the seller's bank for credit, the bank became the owner, and was entitled to sue the buyer for the price.—*Id.*

**App. 1913.** A bank which has advanced money to the consignor of grain and taken as security therefor a draft on the consignee, attached to the bill of lading, is entitled to the grain, as against an attachment in a suit by the consignee against the consignor.—*A. J. Poor Grain Co. v. Franke Grain Co.*, 157 S.W. 840, 171 Mo. App. 354.

The right of a bank, holding a draft with bill of lading, to a shipment of grain, as against an attachment in the suit of the consignee against the consignor, is not defeated by the bank's knowledge that the consignor had sold the grain to the consignee.—*Id.*

**App. 1913.** Where the buyer of corn for cash did not pay the shipper but transferred the bill of lading, with draft on a third party attached, to a bank, which, on the buyer's insolvency, canceled its credit for the draft, stopped payment thereof, and sold the corn, the bank was not a purchaser for value within Rev. St. 1909, §§ 11956, 11957, making bills of lading negotiable, and was liable to the original shipper of the corn for its value.—*Boyd v. Bank of Mercer County*, 160 S.W. 587, 174 Mo. App. 431.

**App. 1914.** Where a bank discounted a draft with a bill of lading for potatoes attached, it was not an intermediate purchaser of the potatoes, and after acceptance and payment of the draft, and delivery of the potatoes to the buyer, the bank could not be made liable for defects and deficiencies in the potatoes.—*Tapee v. Varley-Wolter Co.*, 171 S.W. 19, 184 Mo. App. 470.

**App. 1914.** In attachment, where a bank claimed the property by the purchase of a draft attached to a bill of lading, evidence held to show that the bank had paid out the amount of the draft.—*Price Brokerage Co. v. Rushfeldt*, 171 S.W. 976, 185 Mo. App. 32.

A bank which purchased a draft attached to a bill of lading and paid out the amount has a claim against the property as against a subsequent attaching creditor.—*Id.*

**App. 1916.** Where a bank agreed in advance to furnish price of lumber and take bills of lading as security, it became owner of bill of lading as soon as it was issued on delivery of lumber, so that lumber could not be subsequently attached as property of consignee.—*Kinsolving v. State Savings & Trust Co.*, 190 S.W. 379, 195 Mo. App. 326.

Where seller of lumber retained bills of lading to keep title until paid by bank, and bills were sent to second bank, pursuant to agreement to pay for lumber and take bills, when title passed from buyer to seller, it passed to second bank by virtue of bill, and lumber could not be attached as property of buyer.—*Id.*

**App. 1917.** A third person, who at request of the buyer of goods shipped with draft attached to bill of lading, pays the draft, and takes up bill of lading, and receives the goods, acquires an interest therein superior to unknown agreement between buyer and seller that draft was for an old debt.—*Frank Adam Co. v. Orpheum Theater Co.*, 193 S.W. 908, 195 Mo. App. 413.

**App. 1918.** Although delivery of bills of lading to the shipper's order to a bank places the legal title to the shipper's order to a bank places the legal title to the shipment in the bank, whether there is a sale of the shipment, or merely a transfer of title for security, depends upon the intention of the parties.—*Cochrane v. First State Bank of Mckton, Tex.*, 201 S.W. 572, 198 Mo. App. 619.

**App. 1920.** The transfer of an interstate bill of lading by indorsement and delivery operates only as a transfer of whatever title the transferor may have to the goods covered thereby.—*Pioneer Trust Co. v. Missouri Pac. R. Co.*, 224 S.W. 106, 204 Mo. App. 289.

#### 59. — Bona fide purchasers.

**Sup. 1896.** The transfer of a bill of lading by delivery without indorsement carries with it all the right of the transferor in the goods represented by it, and extrinsic evi-

dence is admissible to show what such interest is. The fact that a state statute provides for the transfer of bills of lading by indorsement does not restrict their transfer to such method.—*Scharff v. Meyer*, 34 S.W. 858, 138 Mo. 428, 54 Am. St. Rep. 672.

**Sup. 1925.** Bank *held* not purchaser in good faith of bills of lading.—*Lewis v. James McMahon & Co.*, 271 S.W. 779, 307 Mo. 552.

**App. 1901.** A bill of lading is the representative of the property therein mentioned, and its indorsement and delivery transfers such property to the holder of the bill, who thereby acquires the legal title to the goods and is entitled to all the rights of a bona fide purchaser for value.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

**App. 1903.** Where plaintiff's agent had customarily waived his right to retain possession of cars of ore sold to M. until paid for, and had permitted the cars to be loaded, sealed, and billed by M., or his agents, and sent forward, before being paid for, plaintiff could not recover the price of cars so shipped from a buyer from M., as against a bona fide transferee for value of the bill of lading therefor.—*American Zinc, Lead & Smelting Co. v. Markle Leadworks*, 76 S.W. 668, 102 Mo. App. 158.

**App. 1906.** A principal consigned goods to a factor. A company of which the factor was president procured possession of the goods and reconsigned them to a third person. A bank bought the drafts drawn on the third person for the price of the goods, on the faith of the bill of lading. Evidence examined, and *held* not to show that the bank bought the drafts with bills of lading attached with knowledge that the company did not own the goods and was insolvent and was going to appropriate the proceeds, instead of turning it over to the principal, and the latter could not follow the goods or the proceeds thereof into the hands of the bank.—*Smith v. Jefferson Bank*, 97 S.W. 247, 120 Mo. App. 527.

**App. 1920.** Where agents of a shipper induced agents of the carrier without authority to issue additional bills of lading for an interstate shipment, promising to surrender the original, such bills of lading were void and of no effect, even in the hands of an innocent holder, to whom they were indorsed, for such holder acquired only the title of the transferor.—*Pioneer Trust Co. v. Missouri Pac. R. Co.*, 224 S.W. 106, 204 Mo. App. 289.

**App. 1920.** Where the rules of a carrier providing for diversion of shipment required the original bill of lading to be surrendered before a new one could be issued, a bill of lading, issued without surrender of the original, is void, even though issued with the authority of the carrier, for a contrary holding would permit a discrimination in violation of Act Cong. Feb. 19, 1903, § 1 (32 Stat. 847), as amended by Act Cong. June 29, 1906, § 2 (34 Stat. 587), and hence such a bill of lading is of no force even in the hands of a bona fide holder, where issued prior to the Pomerene Bill of Lading Act (49 USCA §§ 81–124), making such bills negotiable.—*Pioneer Trust Co. v. Nashville, C. & St. L. R. Co.*, 224 S.W. 109, 204 Mo. App. 328.

Where a second bill of lading issued for an interstate shipment without surrender of the original was void because issued contrary to the rules of the carrier, the carrier cannot be held liable thereon, even by an innocent purchaser, on theory of estoppel, for that would tend to permit discrimination.—*Id.*

#### 60. Receipts for goods.

**Sup. 1872.** A shipper delivered goods to one railroad, to be carried to a point on another road. In an action against the latter for loss of part of the goods, a receipt for the goods was introduced signed by defendant's agent. The receipt was in the usual form issued by defendant. *Held* to imply an agreement by defendant to carry the goods to their destination.—*Landes v. Pacific R. R.*, 50 Mo. 346.

#### 61. Contracts for transportation of goods.

Special contracts—

As to amount of charges, see post, 6192.

For through transportation, see post, 6173.

For transportation of live stock, see post, 6207.

For transportation of passengers, see post, 6258.

What law governs, see ante, 646.

#### 62. — Requisites and validity.

**Sup. 1881.** An agreement on the part of a shipper to ship over no other railroad was a sufficient consideration for an agreement on the part of the railroad fixing a specified rate.—*Riggins v. Missouri River, Ft. S. & G. R. Co.*, 73 Mo. 598.

**Sup. 1882.** Where a freight agent wrote plaintiff giving a rate between certain points, but for nine days thereafter plaintiff made no

reply to such letter, although abundant opportunities existed, there was no contract for a shipment at such rate, since a binding contract can only occur when the offer made is met by an acceptance communicated to the party making the offer.—*Robinson v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 494.

**Sup. 1887.** A shipper cannot avoid the effect of a written contract of carriage on the ground that he did not read it, where there was no mistake or fraud on the part of the carrier.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**Sup. 1896.** A shipper of freight who signs a contract of shipment, in the absence of fraud or deceit, is conclusively presumed to know its contents and to have assented thereto.—*Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 34 S.W. 41, 136 Mo. 177, opinion adopted by court in banc 37 S.W. 828, 136 Mo. 177.

**Sup. 1900.** Plaintiff wrote defendant, a carrier, that he was about to lease a quarry, and wanted a quotation of rates for shipments to be made during the two years following. On defendant's answer, giving a rate, providing the shipments were reasonably distributed during the season, plaintiff replied that, unless he got a lower rate, he would not be able to do much shipping. *Held*, not to amount to a contract.—*Steffen v. Mississippi River & B. T. Ry. Co.*, 56 S.W. 1125, 156 Mo. 322.

**App. 1877.** Where a bill of lading recited that the goods received by the carrier were to be transported to Nashville, Tennessee, and there delivered to J., and under the head of "Marks," in a statement forming part of the bill, where the words "J., Atlanta, Ga.," the bill could not be construed as a contract to convey the goods to Atlanta.—*Wheeler v. St. Louis & S. E. Ry. Co.*, 3 Mo. App. 358.

**App. 1905.** Plaintiffs purchased meat of a packing company, requesting it to ship it to a certain point. The agent of defendant railroad company solicited the shipment, and furnished the agent of the packing company with a blank form of contract, which was filled out and signed by defendant's agent, and plaintiffs paid the freight. *Held*, that the contract was binding between defendant and plaintiffs, although not signed by the latter or by the packing company as their agent.—*Eckles v. Missouri Pac. Ry. Co.*, 87 S.W. 99, 112 Mo. App. 240.

**App. 1908.** In the absence of fraud or imposition, a patron of a railroad is bound by his contract, being required to ascertain its

terms before executing it, and being bound, prima facie at least, by the recitals of fact against his interest contained therein.—*Mires v. St. Louis & S. F. R. Co.*, 114 S.W. 1052, 134 Mo. App. 379.

**App. 1914.** Neither Rev. St. 1909, § 3239, nor rules of the Railroad and Warehouse Commission, prevent carriers from transporting jewelry as freight under special contract.—*Russell v. Quincy, O. & K. C. R. Co.*, 164 S.W. 164, 177 Mo. App. 186.

Where a bill of lading provided that the carrier should not be liable for transportation of jewelry except under special contract containing the value of the articles, the failure of the carrier's agent to indorse the special contract on the bill, together with the value of the property, was not fatal to plaintiff's right to recover for the loss thereof.—*Id.*

**App. 1916.** Where shipment was subject to delay on account of bridge of connecting carrier being out, contract that shipment was subject to delay on account of bridge, not agreed to before shipment was accepted for transportation, was without consideration, and plaintiff's subsequent ratification could not give it vitality.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

### 63. — Construction and operation.

**Sup. 1881.** A contract between plaintiffs and a railroad company read: "Lead from B. to St. Louis at 22½ cents per hundred. All lead shipped by C. to be forwarded \* \* \* at above rates from January 1, 1873, to January 1, 1874, and above rates guaranteed for same time." *Held*, that such instrument showed that defendant was to transport and plaintiffs to deliver to defendant, to be transported at 22½ cents per 100 pounds, all lead shipped by plaintiff within the year 1873 from B. to St. Louis, and that, though plaintiffs did not bind themselves to ship any lead, they did obligate themselves to ship over defendant's road all that they should ship to St. Louis.—*Riggins v. Missouri River, Ft. S. & G. R. Co.*, 73 Mo. 598.

**Sup. 1894.** If there is a reasonable doubt as to the construction of a contract of carriage, it is to be construed strictly and most strongly against the carrier.—*E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 26 S.W. 704, 122 Mo. 258.

**Sup. 1908.** A shipping contract, reciting that the charge for transportation was "at the rate of ——— tariff ——— per cwt.," was for the full tariff rate, though it also recited that

it was less than the rate charged for shipments at the carrier's risk.—*George v. Chicago, R. I. & P. Ry. Co.*, 113 S.W. 1099, 214 Mo. 551, 127 Am. St. Rep. 690.

**Sup. 1927.** Contract with transfer company to carry baggage from station to residence *held* new contract, independent of transportation contract with railroads.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (App. 1924) 266 S.W. 1032.

**App. 1905.** Plaintiffs, who were regular shippers of lumber, ties, and piling, wrote to defendant railroad, asking the rate on lumber. Defendant replied, guaranteeing a rate to the point of delivery to a connecting carrier. Plaintiff shipped ties, for which defendant charged and collected a greater rate than agreed on in its letter to plaintiff. Defendant's tariff sheet did not include ties within the term "lumber," and there was no evidence that defendant understood, or could have been reasonably expected to have understood, when applied to by plaintiff, that the latter intended to ship ties, when he asked the rate on lumber. *Held*, that the letter written by defendant did not amount to an agreement to carry ties at the rate specified therein.—*Greason v. St. Louis, I. M. & S. Ry. Co.*, 86 S.W. 722, 112 Mo. App. 116.

It is the duty of the court to interpret writings free from ambiguity, and to determine what is meant by words used therein, in an ordinary rather than a peculiar technical or trade sense; and where, in a freight contract, the word "lumber" was used, and there was no evidence that it was used in any other than its common meaning, whether it included ties was for the court.—*Id.*

**App. 1909.** Independently of proof of usage to the contrary, an express company, being a common carrier, is bound under its contract to transmit money and pay it to the order of the consignee, to deliver it to him when it arrives at its destination, or at least to notify him of its arrival, and that it is ready to pay him.—*Downs v. Pacific Express Co.*, 116 S.W. 9, 135 Mo. App. 330.

**App. 1920.** In an action for breach of contract to transport corn into Mexico without reloading into other cars, *held* that the destination of shipment was not a point in Texas, as claimed by defendant, notwithstanding provision that the corn should not be taken into Mexico without surrender of bills of lading, which was for the shipper's protection; hence, where a connecting carrier refused to transport the corn into Mex-

ico in accordance with the contract, defendant was liable.—*Brunswick v. Bush*, 221 S.W. 759, certiorari dismissed *Bush v. Brunswick*, 41 S.Ct. 9.

#### 64. — Performance or breach.

**Sup. 1852.** If a common carrier makes a contract for the future transportation of goods, and at the time appointed fails to have his boat at the place, he is no more exonerated by the act of God from liability for failure to comply with an express stipulation of his contract than any other person would be for a failure from the same cause to comply with any other kind of contract, the rule in relation to this excuse being that, where the law imposes the duty, the law will acknowledge the act of God as an excuse for its nonperformance; but where one by his own contract expressly and absolutely undertakes to do any act, he cannot be discharged from the performance by the act of God, because it was his own folly not to have made the proper exception.—*Collier v. Swinney*, 16 Mo. 484.

**Sup. 1855.** Where the contract was for the transportation of a specific number of articles, it is no defense, in a suit for the breach of the contract, which the defendant did not offer to fulfill, that the plaintiff did not have so large a number ready for transportation.—*Taylor v. The Robert Campbell*, 20 Mo. 254.

**Sup. 1881.** Where a contract between a shipper and a railroad provided that the shipper should have a certain rate during the next year, and that the shipper should ship all his goods over such road, and the shipper sent goods over another road, but thereafter the railroad received freight from him at the price fixed in the contract, although it was the same rate given to shippers generally, if the freight was accepted under the contract and not under the general liability of a common carrier, such carriage amounted to a waiver of the breach of the contract on the part of plaintiff.—*Riggins v. Missouri River, Ft. S. & G. R. Co.*, 73 Mo. 598.

**App. 1894.** The fact that a shipper at the time of entering into a contract with a carrier for the transportation of goods knew that it would be difficult, or next to impossible, for the carrier to fulfill its contract, does not relieve it from damages for nonperformance.—*Myres v. Diamond Joe Line*, 58 Mo. App. 199.

The act of God is no excuse for nonperformance of a carrier's contract of transportation to be thereafter performed which the carrier has voluntarily undertaken.—*Id.*

### 65. Contracts for means of transportation.

#### 66. — Requisites and validity.

**App. 1916.** The carrier's promise to furnish cars and the shipper's agreement to route shipments by the carrier's lines are sufficient mutual consideration to support the contract, even if the cars were to be furnished at a point 50 miles from the carrier's lines.—*Kissell v. Pittsburgh, Ft. W. & C. Ry. Co.*, 188 S. W. 1118, 194 Mo. App. 346.

A railroad may bind itself by contract to furnish cars at a place not on its own line, but that of a connecting carrier.—*Id.*

#### 66½. — Construction and operation.

**App. 1916.** Where the carrier agreed to furnish cars to the shipper, whose place of business was at N., 50 miles from the carrier's nearest line point, no guaranty of delivery at N. was necessary on which to base liability for failure to deliver.—*Kissell v. Pittsburgh, Ft. W. & C. Ry. Co.*, 188 S.W. 1118, 194 Mo. App. 346.

#### 67. — Performance or breach.

**Sup. 1892.** In an action against a railroad company for failing to furnish coal cars ordered for a particular day, the evidence showed that the cars were delivered at 4 o'clock in the afternoon, and that the miners quit work at that hour, so that the cars could not be loaded that day. *Held* that, where the railroad company was not required by the order to furnish the cars at any particular hour, the delivery at any hour of the day was sufficient.—*McGrew v. Missouri Pac. Ry. Co.*, 19 S.W. 53, 109 Mo. 582.

#### 68. Modification, merger, or rescission.

**Sup. 1887.** All prior verbal negotiations between the parties to a shipping contract are merged in the written contract, and the shipper cannot admit the execution of the contract and avail himself of the fact that he did not read it or know its contents, where no mistake, fraud, imposition or deceit is charged to have occurred.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**Sup. 1897.** A specific agreement by the receiving carrier to transport the freight only to the terminus of its line, and there deliver to a connecting carrier, cannot be controlled by markings on the bill of lading, giving the name of the consignee and the ultimate destination of the freight.—*Miller Grain & Ele-*

*vator Co. v. Union Pac. Ry. Co.*, 40 S.W. 894, 138 Mo. 658.

**Sup. 1922.** The provisions of 49 USCA § 93, that any alteration is a bill of lading without authority from the carrier, either in writing or noted on the bill, shall be void, do not apply to a parol agreement between the consignor and the parties to be notified authorizing them as agents to receive the goods from the carrier without the production or surrender of the bill of lading.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88.

#### 69. Actions for breach of contract.

##### 69 (1). In general.

**Sup. 1894.** One with whom a railroad company makes a contract for the shipment of goods may, *prima facie*, recover for its breach, without showing title to the property.—*Davis v. Jacksonville Southeastern Line*, 28 S.W. 965, 126 Mo. 69.

**Sup. 1897.** Where a railroad company was induced to break its contract with a shipper by threats and representations of a third person, the shipper's remedy is an action against the railroad company for a breach of contract.—*Glencoe Sand & Gravel Co. v. Hudson Bros. Commission Co.*, 40 S.W. 93, 138 Mo. 439, 36 L. R. A. 804, 60 Am. St. Rep. 560.

##### 69 (2). Pleading.

**Sup. 1887.** A petition in an action on a shipping contract is defective where it does not set forth the terms of the contract and allege a breach thereof.—*Garrison v. Babbage Transp. Co.*, 6 S.W. 701, 94 Mo. 130.

**App. 1919.** In an action by a shipper of potatoes against the carrier for failure to carry out an agreement to reconsign the shipment, petition *held* to allege a definite breach of an oral special agreement on the carrier's part to immediately divert or reconsign by wire, on a given date, such shipment.—*Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531, 201 Mo. App. 609.

**App. 1920.** In an action for breach of contract for shipment of corn into Mexico without reloading into other cars, the defense that the tariffs on file did not provide for such service must be specially pleaded to be available.—*Brunswig v. Bush*, 221 S.W. 759, certiorari dismissed *Bush v. Brunswig*, 41 S. Ct. 9.

Where the carrier did not plead the defense that the tariffs on file made no provision

for the service to be rendered under the contract, and that it was therefore invalid, the carrier cannot take advantage of such defense on the ground that plaintiff's own evidence showed the contract to be illegal, unless plaintiff's evidence was sufficient to establish illegality as a matter of law.—Id.

#### ⚡69 (3). Evidence.

**App. 1916.** Evidence that shipper frequently requested cars at point not on carrier's lines, and obtained them through traveling fast freight agent, warrants finding that carrier, by a course of dealing, had led shipper to believe that furnishing cars at such point was not unusual, and that the contract so to furnish them was not beyond the scope of the agent's authority.—*Kissell v. Pittsburgh, Ft. W. & C. Ry. Co.*, 188 S.W. 1118, 194 Mo. App. 346.

**App. 1919.** *Cleari Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531. See Carriers, ⚡69(2) in this Digest.

#### ⚡69 (4). Damages.

**Sup. 1900.** Where plaintiff, at the time of making an agreement for shipping rates with defendant company, stated he intended to make certain contracts, but did not state the terms thereof, loss of profits on such collateral contracts, occasioned by defendant's failure to keep its agreement as to rates, could not have been within the probable contemplation of plaintiff and defendant when their agreement was made, and plaintiff could not recover for such loss.—*Steffen v. Mississippi River & B. T. Ry. Co.*, 56 S.W. 1125, 156 Mo. 322.

Where plaintiff made an agreement for a shipping rate with defendant carrier, and, on defendant's refusal to give the rate, canceled collateral contracts made on the faith of such agreement, he could not recover loss of prospective profits on such contracts, since he should have performed them, making his shipments at regular rates, and holding defendant for the excess over the rate agreed.—Id.

**App. 1920.** Where the shipper induced the carrier's agent to issue a second bill of lading for an interstate shipment, promising to surrender the first, which had already been negotiated to plaintiff, and the shipment was diverted to the point of destination specified in the second bill, which with draft attached was also negotiated to plaintiff, held that, where plaintiff collected the draft attached to the second bill, it could recover from the carrier, which was liable for the neglect of con-

necting carriers, only the damages sustained by reason of failure to deliver the shipment at the destination mentioned in the first bill of lading; therefore the amount received from the collection of the draft attached to the second must be deducted.—*Pioneer Trust Co. v. Missouri Pac. R. Co.*, 224 S.W. 106, 204 Mo. App. 289.

#### ⚡69 (5). Trial.

**Sup. 1892.** An instruction that a railroad company is not required to furnish cars at any particular hour of the day, and that a delivery at any hour of the day is a delivery on such day, does not conflict with an instruction that the railroad has the right to furnish and supply cars the day before the day specified, so as to have them ready for the day for which demanded.—*McGrew v. Missouri Pac. Ry. Co.*, 19 S.W. 53, 109 Mo. 582.

**App. 1916.** Evidence held to present a jury question whether the contract was to furnish cars at L., on defendant carrier's line, or at N., 50 miles away, at point of plaintiff shipper's business and point of loading.—*Kissell v. Pittsburgh, Ft. W. & C. Ry. Co.*, 188 S.W. 1118, 194 Mo. App. 346.

Where cars were frequently furnished to plaintiff at his place of business at N., 50 miles from the carrier's line, and the carrier agreed to furnish him cars, the court cannot say, as a matter of law, that the carrier was bound only to furnish the cars at the nearest point on its lines to N., or that there was no meeting of the minds.—Id.

**App. 1920.** In an action for breach of contract to transport corn into Mexico without reloading into other cars, plaintiffs' evidence held insufficient to establish that the tariffs on file made no provision for such service, and to thus show illegality of the contract as a matter of law.—*Brunswick v. Bush*, 221 S.W. 759, certiorari dismissed *Bush v. Brunswick*, 41 S. Ct. 9.

### (C) CUSTODY AND CONTROL OF GOODS.

#### ⚡70. Title to goods.

**App. 1913.** Where a bill of lading shows a general consignment, and not to shipper's order, or with other reservation, it prima facie vests the legal title in the consignee as to the carrier.—*Carder v. Atchison, T. & S. F. Ry. Co.*, 153 S.W. 517, 170 Mo. App. 698.

#### ⚡71. Rights of carrier.

**App. 1899.** A railroad, holding a loaded car on its tracks for further shipment, acts as a bailee of the car, and can maintain an ac-



tion against another railroad for the destruction of the car and its contents caused by a collision due to the negligence of such other railroad.—*Chicago & A. R. Co. v. Kansas City Suburban Belt R. Co.*, 78 Mo. App. 245.

72. Rights of consignor and consignee in general.

**Sup. 1904.** Where the consignee of property is damaged by injuries thereto in shipment, he is entitled to maintain an action against the carrier for breach of duty on its part in relation of the consignment, though the contract of affreightment was made with the consignor.—*Burriss & Haynie v. Missouri Pac. Ry. Co.*, 78 S.W. 1042, 105 Mo. App. 659.

**App. 1911.** Where the consignee of three cars, after having paid the consignor for the goods, turned over the bills of lading for two of the cars to defendant carrier as its agent for re-consignment, and retained possession of the bill of lading for the third car, defendant is liable to the consignee for the diversion of the cars at the direction of the consignor and consequent failure to deliver to the consignee, whether the consignee had refused to pay for the goods at one time or not.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 137 S.W. 890, 157 Mo. App. 160.

**App. 1921.** Where goods have been delivered to a carrier to be transported to a consignee, the latter has the right of possession of the goods, and by virtue thereof has the right to recover them or their value from any one who seizes them en route except the true owner.—*Buschow Lumber Co. v. Hines*, 229 S.W. 451, 206 Mo. App. 681.

73. Change of destination.

**App. 1911.** A shipper has the right to stop or divert a car at an intermediate point.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

**App. 1913.** The owner of cattle *held* not entitled to complain that his demand for diversion of the shipment was not complied with, where they had been consigned generally to a commission house, and there was no other evidence of his ownership.—*Carder v. Atchison, T. & S. F. Ry. Co.*, 153 S.W. 517, 170 Mo. App. 698.

**App. 1917.** When carrier knows shipper to be the owner, *held*, that it is bound to recognize his right to divert the shipment to a third person and is liable for delivering to the consignee in disregard of the shipper's order.—*Wichita Poultry Co. v. Southern Pac. Ry. Co.*, 198 S.W. 82, 197 Mo. App. 578.

74. Stoppage in transitu.

Effect of seizure under legal process, see post, 92.

**App. 1883.** Notice to the carrier must usually be given in exercising the right of stoppage in transitu so as to fix his responsibility if he subsequently delivers to the vendee; but when the goods have already been taken by legal process out of the carrier's custody, a notice to him would be useless.—*Schwabacher v. Kane*, 13 Mo. App. 126.

**App. 1910.** Strict proof of insolvency is not essential to exercise the right of stoppage in transitu; "insolvency" in that sense meaning general inability to pay debts.—*Seigfried v. Chicago, B. & Q. R. Co.*, 126 S.W. 798, 147 Mo. App. 543.

Where the carrier, on being told by the shipper that he feared the consignee's insolvency, and on request to stop the goods in transit, promised to stop them upon the shipper surrendering the bill of lading with a signed order to stop indorsed thereon, and afterwards told him that the goods had been stopped, it was estopped from thereafter denying the shipper's right to stop the shipment on the ground of want of proof of insolvency, or of knowledge by the shipper thereof, when he directed the goods to be stopped.—*Id.*

A carrier could show as a defense to an action for damages for delivering goods to the consignee, after they had been ordered stopped by the shipper, that the goods had been delivered to the consignee before it was notified to stop the shipment and before it had time to communicate with its agent at destination.—*Id.*

**App. 1914.** Where goods fraudulently bought on credit were resold to plaintiff, a bona fide purchaser, *held*, that the resale deprived the original seller of his right of stoppage in transitu.—*Long-Bell Lumber Co. v. Chicago, B. & Q. R. Co.*, 167 S.W. 1183, 181 Mo. App. 223.

75. Seizure under legal process.

**Sup. 1903.** Where plaintiff had possession of goods, and delivered them to a railroad for shipment to herself as consignee, and they were attached by defendant in a suit against another, plaintiff's possession gave her a prima facie right to recover in conversion.—*Rosencranz v. Swofford Bros. Dry Goods Co.*, 75 S.W. 445, 175 Mo. 518, 97 Am. St. Rep. 609.

**676. Actions by or against carriers in respect of goods.**

**Sup. 1872.** Where the owner of goods ships them consigned to another, to whom they are not delivered, nor to the owner, who demands them at the point of destination, the owner may sue for the loss.—*Landes v. Pacific R. R.*, 50 Mo. 346.

**Sup. 1885.** Where plaintiffs, who were the consignees of wheat, paid the draft drawn on them, and received the bill of lading, to which the draft was attached, and subsequently purchased the wheat from the owner, they were the real parties in interest, and entitled to sue for the destruction of the wheat.—*Kirkpatrick v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo. 341.

The consignees of wheat which was destroyed before reaching its destination may maintain an action against the carrier for damages for such destruction.—*Id.*

Where plaintiffs, who were the consignees of wheat, paid the draft on them, and received the bill of lading to which the draft was attached, and subsequently purchased the wheat, the fact that the wheat was destroyed prior to the absolute sale did not affect their right to maintain an action for its loss, as the property continued in the owner and was the subject of transfer to plaintiff, and they could maintain the action on the ground of the transfer, if on no other.—*Id.*

**App. 1883.** Where the consignee of goods refuses to accept them because not delivered in time, and the contract of sale between the consignee and consignor is thus rescinded, the consignor may sue the carrier for delay in delivery.—*Bergner v. Chicago & A. R. Co.*, 13 Mo. App. 499.

**App. 1895.** Where goods were sold deliverable at a distant point, and were shipped to such point over defendant's railroad and connecting carrier's of its own choosing, and the consignee refused to accept the goods in their injured condition, the consignor is the proper party to sue for a loss or injury to the goods.—*Hance v. Wabash & W. Ry. Co.*, 62 Mo. App. 60.

**App. 1899.** In an action by the consignor of freight for negligent failure to stop the property in transitu, it was proper to refuse instructions that, if the goods were beyond the terminus of defendant's railroad when it was notified of the desire to change the consignee, plaintiff could not recover, where it ignored the evidence showing that defendant

nevertheless did undertake to stop them, and had plaintiff enter into an indemnifying bond, and refused to allow him to immediately forward a dispatch over the Western Union wire.—*Willock v. Missouri Pac. Ry. Co.*, 79 Mo. App. 76.

In an action by a consignor of freight for negligent failure to stop the property in transitu, it was proper to refuse an instruction to the effect that if defendant did not know, and had no means of knowing, in whose hands the goods were when plaintiff notified it to change the consignee, and that it had no means of identifying the goods, then it was not negligence to fail to send a telegram to New York from Kansas City, where such instruction ignored the undisputed testimony that plaintiff offered to accept the responsibility of stopping the goods if they would send a dispatch to New York as he requested, he himself having ascertained the proper place to be addressed.—*Id.*

In an action against a carrier for negligent failure to stop goods in transitu, it appeared that the consignor notified defendant's agents more than 24 hours before the goods were delivered in New York that he furnished them with the address at the place of consignment, where the goods should have been stopped, and told them to be quick or he would lose his property, and offered to take the risk of stopping them if they would allow him to send the dispatch over the Western Union wire, but they refused and delayed, later sending the dispatch to St. Louis too late for action there, where it was held till next day, and the evidence failed to show that the dispatch, or any other communication, ever reached New York. *Held*, that the question of negligent delay was properly submitted to the jury, and that the judgment for plaintiff was proper.—*Id.*

**App. 1906.** A suit on a transportation contract is properly brought in the name of the consignor, irrespective of whether he is the owner of the goods.—*Ross v. Chicago, R. I. & P. R. Co.*, 95 S.W. 977, 119 Mo. App. 290.

**App. 1907.** M. & Son contracted to purchase a vehicle from plaintiffs for \$300, payable \$35 cash with the order, \$30 cash on arrival, and the balance in monthly notes, with interest, secured by a deed of trust thereon for the unpaid portion of the price. After payment of the first cash installment plaintiffs shipped to their own order the vehicle and a harness purchased as part of the same contract, and sent the bill of lading to a bank-

er, with instructions to deliver the same to the buyer on his making the other cash payment and executing the notes and mortgage. The vehicle was injured in a wreck, whereupon plaintiff and the buyer rescinded the contract; plaintiff returning the cash paid. After this the carrier repaired the vehicle and shipped it to the buyer, who tendered compliance with the original contract, which plaintiffs refused. *Held*, that plaintiffs were the owners of the property at the time it was injured, and were therefore entitled to recover against the carrier as for a conversion.—*Norris v. St. Joseph & G. I. Ry. Co.*, 101 S.W. 159, 124 Mo. App. 16.

**App. 1907.** In an action for the loss of goods delivered to a common carrier for transportation occurring after the assignment of the bill of lading and the vesting of the title in the goods to the consignee or the assignee of the bill of lading, such consignee or assignee is a proper party plaintiff.—*Gratlot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

A consignor of goods, though he has no property or interest in the goods, is a proper party plaintiff in an action against a carrier for breach of a contract of carriage, on the ground that he has an interest in the contract.—*Id.*

**App. 1909.** Where a buyer refused to accept goods, and reshipped to the seller, he cannot recover for their loss in transit.—*Nathan v. Missouri Pac. Ry. Co.*, 115 S.W. 496, 135 Mo. App. 46.

**App. 1910.** In an action against a carrier for damages for delivering goods to the consignee after they had been stopped in transit by the shipper, evidence *held* to sustain a finding that the consignee was insolvent when the order to stop the shipment was given.—*Seigfried v. Chicago, B. & Q. R. Co.*, 126 S.W. 798, 147 Mo. App. 543.

**App. 1910.** The consignor may properly bring suit on a transportation contract, whether he be the owner or not, though he cannot sue *ex delicto* for breach of duty by the carrier.—*Central American S. S. Co. v. Mobile & O. R. Co.*, 128 S.W. 822, 144 Mo. App. 43.

**App. 1910.** Where the consignor has no interest in the goods, he will be confined to assumption, and cannot sue in an action *ex delicto* for breach of duty by the carrier.—*Bennett v. Chicago, R. I. & P. Ry. Co.*, 131 S.W. 770, 151 Mo. App. 203.

**App. 1912.** An action for loss of goods in transit may be maintained against a carrier either by the shipper or consignee.—*Henry Bromschwig Tailors' Trimming Co. v. Missouri, K. & T. Ry. Co.*, 147 S.W. 175, 165 Mo. App. 350.

**App. 1914.** A broker to whom goods have been consigned for sale on commission has sufficient interest to maintain an action against the carrier for damages to the goods, and his judgment will bar another action by the real owner.—*Collins v. Denver & R. G. Ry. Co.*, 167 S.W. 1178, 181 Mo. App. 213.

**App. 1915.** In action for damages to car load of vegetables, shipper to whom a part owner had assigned his rights *held* entitled to recover for damages sustained by such owner.—*Watson v. Union Pac. R. Co.*, 178 S.W. 871.

**App. 1916.** A suit on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S.W. 131.

**App. 1916.** Son, undertaking to bury mother's body and assuming responsibility for funeral expenses and transportation charges, *held* entitled to sue carrier for mishandling of the corpse and box containing it in his presence.—*Wall v. St. Louis & S. F. R. Co.*, 182 S.W. 1057.

**App. 1921.** In an action by a consignee of lumber against a carrier alleged to have converted the shipment, the carrier cannot defeat the action by showing title in another without connecting itself with the right in such persons.—*Buschow Lumber Co. v. Hines*, 229 S.W. 451, 206 Mo. App. 681.

**App. 1923.** One delivering an automobile to a warehouse company for shipment may sue the railway company, to which it delivers the car, for loss thereof by fire after being loaded on a freight car, though the warehouse company was his agent, instead of bailee, as between him and the railway company, and the bill of lading was in the warehouse company's name, the contract being for his benefit; but he cannot recover if the loss was caused by the negligence of such agent, unless the railway company also was negligent.—*Train v. Atchison, T. & S. F. Ry. Co.*, 253 S.W. 497, 214 Mo. App. 354.

**App. 1924.** Corporation doing business locally, under name of company taken over by it, at time of purchase and shipment of goods under bills of lading, naming such com-

pany as consignee, *held* real party in interest entitled to sue, under Rev. St. 1919, § 1155, for damage to goods in transit.—*American Fruit Growers v. St. Louis, B. & M. Ry. Co.*, 261 S. W. 949, certiorari denied *St. Louis B. & M. R. Co. v. American Fruit Growers*, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

**App. 1925.** One selling wheat at final mill weights may sue for loss, though shipped in name of purchaser's agent.—*Forest Green Farmers' Elevator Co. v. Davis*, 270 S.W. 394, 216 Mo. App. 545.

**App. 1926.** Instruction permitting recovery on showing that negotiable bill of lading was purchased in good faith and held as collateral security not error.—*First Nat. Bank v. Missouri Pac. Ry. Co.*, 278 S.W. 1075, 220 Mo. App. 941.

Defense that plaintiff could not recover on bill of lading because held as collateral security *held* without merit.—*Id.*

**App. 1926.** Shipper *held* under evidence entitled to sue for damage in transit, although eggs were shipped under notify bill of lading and draft therefor was paid by consignee (49 USCA § 20).—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

#### (D) TRANSPORTATION AND DELIVERY BY CARRIER.

By connecting carrier to consignee of goods, see post, ¶175.

Carriage of live stock, see post, ¶208-213.

Delivery to connecting carrier, see post, ¶174.

#### ¶77. Duties as to transportation in general.

**Sup. 1852.** The law in relation to the duties, obligations, and exemptions of common carriers does not begin to apply until the actual bailment is made.—*Collier v. Swinney*, 16 Mo. 484.

**Sup. 1874.** In an action by a shipper of hay to recover for standards voluntarily erected by him upon flat cars for safety of transportation, *held*, that the railroad company was not liable; no special contract being proved, and the rule applying that the carrier is, in the first instance, the judge of the sufficiency of his carriages.—*Sloan v. St. Louis, K. C. & N. Ry. Co.*, 58 Mo. 220.

**App. 1925.** Strike of switchmen on railroads entering city to which goods were ordered reconsigned not valid reason for refusal to accept reconsignment order.—

*Buschow Lumber Co. v. Union Pac. R. Co.*, 276 S.W. 409, 220 Mo. App. 743.

#### ¶78. Performance of special contract.

See explanation, page iii.

#### ¶79. Route.

Acts of connecting carriers, see post, ¶173.

**App. 1911.** A carrier must conform to the shipper's routing directions, except as to perishable goods, where conformity would cause injury to the shipment.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

**App. 1922.** While it is ordinarily the duty of a carrier operating two lines between the same points, to ship by the cheaper route, it is not required to do so, where, considering its own interest and that of the public, as well as the shipper's, it would be unreasonable.—*Stroud v. Missouri Pac. R. Co.*, 236 S.W. 891, 210 Mo. App. 311.

#### ¶80. Destination.

**App. 1909.** A place to which grain was removed by a carrier *held* not the same point as the original point of delivery, because it was within the switch limits of the point of delivery.—*National Bank of Commerce of Kansas City v. Southern Ry. Co.*, 115 S.W. 517, 135 Mo. App. 74.

#### ¶81. Entry in custom house.

See explanation, page iii.

#### ¶82. To whom delivery may be made.

Rights of transferee of bill of lading, see ante, ¶57.

**Sup. 1879.** A delivery to the general agent of the consignor is not a fulfillment of the carrier's duty to deliver to the consignee or his order.—*Wilson Sewing Mach. Co. v. Louisville & N. R. Co.*, 71 Mo. 203.

**Sup. 1887.** Plaintiff's assignors shipped by a common carrier certain goods, addressed to another person, but took a bill of lading, which showed that the goods were consigned to the order of the consignors. On the arrival of the goods, another common carrier, in the usual course of business, and at the addressee's request, obtained and delivered them to him, without notice that he was not the real owner. *Held*, that there had been no conversion by the second carrier.—*Nanson v. Jacob*, 6 S.W. 246, 93 Mo. 331, 3 Am. St. Rep. 531.

**Sup. 1889.** A shipper billed goods to his local agent, and not to the purchaser, and the agent, without transferring the bill of lading, made a further contract with defendant for the carriage of the goods to the place of delivery to the purchaser; the agent directing that the goods should be delivered only to his order. *Held* that, the evidence being sufficient to support a finding that the shipper had not parted with the right to the possession of the goods, a delivery of them to the purchaser was at defendant's risk.—*Wolfe v. Missouri Pac. Ry. Co.*, 11 S.W. 49, 97 Mo. 473, 3 L. R. A. 539, 10 Am. St. Rep. 331.

**Sup. 1922.** The authorization of a consignor to a consignee as his agent to receive a shipment of goods for him is not required to be in writing.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88.

While the mere fact that persons are required to be notified by a shipper's order bill of lading gives them no rights in or authority to receive the goods, and does not make them agents of the consignor, such agency may be created by a subsequent parol agreement.—*Id.*

**App. 1876.** Consignor, having received an order for goods from an out of town place, delivered them to a carrier, to be taken to such place, and delivered to consignee. The bill of lading required the goods to be removed from the carrier's station within a certain time after arrival, and failure to do so was to change the carrier's liability to that of a warehouseman. On arrival, the person to whom the consignor supposed he had sent the goods refused to receive them, claiming never to have ordered them, and, after expiration of the time specified in the bill of lading, another person of the same name, and the one who had ordered them, a stranger in the community, called for them, produced the bill of lading, and the goods were delivered to him. *Held*, that the carrier was not liable, there having been no misdelivery.—*Bush v. St. Louis, K. C. & N. Ry. Co.*, 3 Mo. App. 62.

**App. 1887.** Where two men bearing the same name live in the same town, and one of them orders goods from a merchant at a distance, and the carrier delivers them to the man of that name who has really made the order, he is not liable to the consignor, though the consignor thought his order was from the other, and though the name of the purchaser was assumed, in the absence of proof of negligence.—*Wilson v. Adams Express Co.*, 27 Mo. App. 360.

**App. 1891.** In an action by the shipper of goods against an express company for

misdelivery, the court instructed that, if defendant in delivering the goods failed to exercise ordinary and proper care, plaintiff was entitled to recover, and that, if the goods were consigned to D., and there was a responsible merchant of that name, and another person, claiming to be D., demanded the goods as consigned to him, and defendant inquired of the responsible merchant if the goods were his, and he replied they were not, and then after reasonable investigation defendant delivered the goods to the one representing himself as D., defendant was not liable provided it delivered the goods in good faith.—*Wilson v. Adams Express Co.*, 43 Mo. App. 659.

**App. 1907.** Where parties to a contract for sale of a vehicle rescinded the contract after injury to the vehicle in a wreck, while in process of shipment, the carrier had no authority to deliver the property to the buyer after having it repaired.—*Norris v. St. Joseph & G. I. Ry. Co.*, 101 S.W. 159, 124 Mo. App. 16.

### 83. Presentation of bill of lading or shipping receipt.

**Sup. 1895.** Where a railroad company issues original and duplicate shipper's order bills of lading, the original not conditioned to be void on delivery on the duplicate, custom and usage at the place of delivery of never delivering a consignment without surrender of the original bills, and of loaning money on such original bills, is not a factor in determining the liability of a railroad on such bills to a bona fide holder thereof, by written assignment, as security for a loan, where the road has delivered the consignment to the shipper on presentation of the duplicate bill alone.—*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 33 S.W. 521, 132 Mo. 492, 53 Am. St. Rep. 505, affirming judgment 62 Mo. App. 531.

Where a carrier issues an original and a duplicate bill of lading, the custom in the place of delivery, that the consignee should take possession of the consignment within six days after notice of its arrival, does not excuse the carrier from liability on the original bill of lading, conditioned for delivery of the consignment, on its presentation, where it delivers the consignment to one presenting the duplicate bill.—*Id.*

**Sup. 1922.** Under 49 USCA § 89, where interstate shipments were deliverable by the bill of lading to the order of the consignor, he could authorize his agent to receive the goods for him, without surrendering the bill of lading, as long as he was the holder there-

of, and, where the rights of a third party did not intervene, the delivery would be a legal one as between him and the carrier.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 203 Mo. 88.

**App. 1886.** A carrier has the right to demand a bill of lading before delivering up a shipment of goods, or to require reasonable evidence of the identity of the person demanding their production.—*Cole v. Wabash, St. L. & P. Ry. Co.*, 21 Mo. App. 443.

**App. 1898.** A carrier of goods is not liable to the shipper for delivering the goods to the consignee, without receiving from him the bill of lading, where the shipper consents to such delivery.—*Schwarzchild & Sulzberger Co. v. Savannah, F. & W. Ry. Co.*, 76 Mo. App. 623.

**App. 1913.** Where hay was shipped under shipper's order bills of lading to which a draft was attached, a delivery by the ultimate carrier to the person designated to be notified, without surrender of the bills or payment of the draft, constituted a conversion.—*Woolston v. Southern Ry. Co.*, 160 S.W. 1023, 177 Mo. App. 611.

Where freight is shipped under shipper's order bills of lading, directing the carrier to notify a third person, such direction only contemplates notice to the parties designated of the arrival of the consignment and does not authorize a delivery to them without production of the bills.—*Id.*

Where a carrier accepting a reshipment of certain hay paid advance charges and on the arrival of the hay at destination wrongfully delivered it to plaintiff's brokers without production of the bills or payment of the draft, plaintiff, having received and retained receipted bills for the freight, including such advance charges paid out of the proceeds of the hay, ratified the delivery and could not recover for conversion.—*Id.*

**App. 1915.** Irregular delivery by carrier to one authorized to receive shipment held not to render carrier liable for loss of goods converted by such person, though it failed to exact the usual written authority.—*Parker-Gordon Cigar Co. v. Chicago, R. I. & P. Ry. Co.*, 179 S.W. 785, 192 Mo. App. 86.

**App. 1917.** Bill of lading, issued to shipper's order, notify third person, signifies shipper is consignee and third person is to be notified on arrival, and delivery to such person without requiring him to produce bill of

lading is conversion by carrier.—*Barton v. Louisville & N. R. Co.*, 196 S.W. 379.

**App. 1925.** Owner of express receipt entitled to delivery of goods.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

#### 84. Place of delivery.

**Sup. 1843.** Where a carrier undertakes to deliver goods at a certain point, "with privilege of reshipping" reserved in the bill of lading, his liability as common carrier continues until the goods are safely delivered at the port of destination. The privilege of reshipment is to allow him to carry the goods in another's vessel, if he will, but does not discharge or affect his liability for the safe delivery of the goods.—*Little v. Semple*, 8 Mo. 99, 40 Am. Dec. 123.

**App. 1885.** A stipulation in a bill of lading that the carrier shall transport the goods by its line and its connecting forwarding lines "until the said goods or merchandise shall have reached the point named in this contract," and the point named under the head of "destination" is "E. G. L. [plaintiff], Lexington, Mo.," required the carrier to deliver the goods at the depot in Lexington, and not at a depot across the river from and a mile north of Lexington, accessible only by ferry boat.—*Loomis v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 340.

**App. 1885.** Where an initial carrier of goods had no line to the destination, its duty was performed when it delivered the goods to the carrier having a depot nearest the destination.—*Moore v. Henry*, 18 Mo. App. 35.

**App. 1885.** A carrier of goods is not required to make delivery at the place of business of the consignee, but only at the carrier's depot in the city where that place of business is located; and hence a carrier cannot render the consignee liable for additional charges incurred by delivering at the place of business.—*Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103.

**App. 1886.** A carrier of freight is not required to deliver the same at the place of business of the consignee, but only at the carrier's usual freight or delivery depot, and is not even required to notify the consignee.—*Buddy v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 206.

**App. 1889.** The usual place for the delivery of freight by a railroad is the freight house; but usage may have established an-

other place, where the carrier may deliver.—*Pindell v. St. Louis & H. Ry. Co.*, 34 Mo. App. 675.

**App. 1899.** A carrier contracted to carry and deliver two car loads of clover seed. *Held*, that its obligation as a carrier continued until delivery or offer of delivery was had at the depot or warehouse at the place of destination, where such goods were customarily unloaded and delivered, and therefore the shipper was entitled to damages arising out of the carrier's failure to deliver at the place of destination.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

**App. 1904.** A carrier's contract of carriage is not completed by side tracking cars at its yards, but its obligation continues until delivery at its depot or warehouse where goods are customarily unloaded and delivered.—*Loeb v. Wabash Ry. Co.*, 85 S.W. 118.

#### 85. Notice to consignee.

See ante, 84.

Where goods are delivered on time by a railroad, the company is not compelled to notify the consignee of their arrival at the depot.

—**Sup. 1874.** *Rankin v. Pacific R. R.*, 55 Mo. 167; (1884) *Gashweiler v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 112, 53 Am. Rep. 558;

**App. 1882.** *Eaton v. St. Louis, I. M. & S. Ry. Co.*, 12 Mo. App. 386; (1883) *Bergner v. Chicago & A. R. Co.*, 13 Mo. App. 409; (1897) *Herf & Frerichs Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

**Sup. 1840.** A carrier is bound to give notice of the arrival of the goods to the persons to whom they are directed, if known, and this notice must be given within a reasonable time.—*Ersine v. The Thames*, 6 Mo. 371.

**App. 1882.** Notice of arrival of goods. See *Udell v. Silver*, 11 Mo. App. 589, memorandum.

**App. 1882.** The contract by which a railroad obligates itself to deliver goods to the consignee requires it to deliver only to its depot at the terminal point, and it is the duty of the consignee to call there for the goods without notice from the railroad.—*Eaton v. St. Louis, I. M. & S. Ry. Co.*, 12 Mo. App. 386.

**App. 1889.** Because plaintiffs had been in the habit of receiving freight shipped over defendant's road on a certain side track, or had told defendant to so deliver all their

freight, did not make a delivery on such track, without notice to plaintiffs, a delivery to them.—*Pindell v. St. Louis & H. Ry. Co.*, 34 Mo. App. 675.

**App. 1890.** The carrying of goods to their destination and notifying the consignee of their arrival is not tantamount to an actual delivery; but the carrier must place the goods in a reasonably safe place, regard being had to their character, to await the action of the consignee in taking actual possession of them, in which case his liability ceases to be that of carrier, and becomes that of warehouseman, or of an ordinary bailee for hire.—*Pindell v. St. Louis & H. Ry. Co.*, 41 Mo. App. 84.

**App. 1894.** Where goods arrive out of time, the carrier should notify the consignee of their arrival; also, where it is the carrier's custom to give notice, even when they arrive on time.—*Frank v. Grand Tower & C. Ry. Co.*, 57 Mo. App. 181.

**App. 1897.** A contract of shipment, made in this state between a resident corporation and a railway corporation having an office and doing business in the state, is governed by the laws of this state, requiring no notice to the consignee of the arrival of goods, where the shipment arrives on time.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

Where a custom to give notice of the arrival of freight to consignees has been established at a locality in the state, such custom, notwithstanding the general rule dispensing with such notice, requires the company to give the notice in order to relieve itself of negligence, in the event of loss of or damage to the freight while in its possession as warehouse keeper.—*Id.*

Where a contract of shipment, made in this state between a resident corporation and a railway company having an office and doing business in the state, does not in terms state that notice of arrival of the goods shall not be given, a usage, uniformly observed by railways at the place of the delivery of the goods, requiring such notice to be given, is binding on the carrier, and a requirement in the contract that the consignee shall call for the goods on the day of their arrival does not dispense with an observance of the usage, but makes its observance the more necessary.—*Id.*

**App. 1900.** On the issue whether a corporation had received notice from carrier of

the arrival of goods shipped to the corporation, it was shown that it was the uniform custom that notice of the arrival of goods was delivered to a certain person, or, in his absence, to another, and that no other person was authorized to receive such notices. The two persons who were in the habit of receiving notices testified that they had not received notice of the arrival of goods, and that no such notice could be found among the papers of the corporation. *Held* to raise the prima facie presumption that the corporation had not received the notice.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 85 Mo. App. 667.

**App. 1903.** Where a contract of shipment is made in Missouri, between a resident corporation of that state and a carrier having an office and doing business there, the contract being governed by the laws of Missouri, the carrier is not required to notify the consignee of the arrival of the shipment, if it arrives at destination on time.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 73 S.W. 346, 100 Mo. App. 164.

Where the uniformly observed usage of the place to which goods are shipped requires the carrier to notify the consignee of the arrival of the shipment, such usage will be binding on the carrier unless its observance is dispensed with by an express stipulation to that effect in the contract of shipment.—*Id.*

A local usage of a place to which goods are shipped, requiring the carrier to notify the consignee of the arrival of the shipment, is not dispensed with by a stipulation in the contract of shipment that the goods are to be called for on the day of their arrival.—*Id.*

Where a contract was made for the shipment of goods to a place where the established usage was for the carrier to notify the consignee of the arrival of the goods, a failure to give such notice would constitute a breach of the contract.—*Id.*

**App. 1906.** In the absence of a custom at the place of destination for carriers to give notice to consignees of the arrival of goods, no notice is required.—*Ross v. Chicago, R. I. & P. R. Co.*, 95 S.W. 977, 119 Mo. App. 200.

**App. 1909.** Where a contract of shipment required notice to be given to the consignee of the arrival of the goods, a charge that defendant was not required to give such notice was properly refused.—*National Bank of Commerce of Kansas City v. Southern Ry. Co.*, 115 S.W. 517, 155 Mo. App. 74.

Where bills of lading required notice to the consignee of the arrival of the goods, mailing the notice to the place of delivery where the consignee was known not to be doing business, and where the notice would not be received, was insufficient.—*Id.*

**App. 1915.** Under a bill of lading authorizing a carrier to deposit goods at flag stations without notice, a delay of 50 minutes in the arrival of a freight train *held* not to entitle the consignee to notice.—*Morrison Tent & Awning Co. v. Illinois Cent. R. Co.*, 175 S.W. 220, 190 Mo. App. 67.

#### 86. Duties of carrier in making delivery.

**Sup. 1862.** The delivery by a carrier must be made or tendered in a proper time and manner, and at a proper place, and prima facie to the consignee personally.—*Bartlett v. The Philadelphia*, 32 Mo. 256.

**App. 1905.** It is the duty of a common carrier, not only to safely carry property to its destination, but to take it to the place provided at that point for delivery of similar property, and there place it in a position of accessibility.—*Russell Grain Co. v. Wabash R. Co.*, 89 S.W. 908, 114 Mo. App. 488.

A sale of goods in possession of a carrier after arrival at destination but before delivery, did not relieve the carrier from the duty to the buyer, derived from the consignee, to place the goods in a position of accessibility for delivery.—*Id.*

**App. 1909.** A carrier of freight must deliver it at the point of destination by so placing it that the shipper may be able to unload it.—*Yount v. Wabash R. Co.*, 119 S.W. 1, 136 Mo. App. 697.

**App. 1911.** A shipper has the right to designate to whom freight shall be delivered, and the carrier must observe such direction.—*Ginnocchio-Jones Fruit Co. v. Missouri, K. & T. Ry. Co.*, 134 S.W. 1028, 153 Mo. App. 598.

**App. 1914.** Ordinarily, where a carrier delivers the property in good condition to the consignee, it is relieved from further liability.—*Bilby v. Chicago, B. & O. R. Co.*, 171 S.W. 39, 184 Mo. App. 644.

**App. 1916.** Where a bill of lading to the order of the consignor was delivered by the bank to buyer that he might exercise his right of inspection, *held* that a mistake of the station agent in marking the bill of lading canceled by delivery did not entitle the seller to



treat the hay as delivered, so as to render the carrier liable for wrongful cancellation.—*St. Joseph Hay & Feed Co. v. Missouri Pac. Ry. Co.*, 185 S.W. 1162.

**App. 1928.** Requirement of bill of lading that notice of arrival be sent after arrival at point of delivery cannot be varied by custom.—*Hoyland Flour Mills Co. v. Missouri Pac. R. Co.*, 5 S.W.(2d) 125, certiorari denied *Eric R. Co. v. Hoyland Flour Mills Co.*, 48 S. Ct. 433, 277 U. S. 586, 72 L. Ed. 1001.

⚡**§87. Duties of consignee or owner as to delivery.**

**App. 1888.** In an action against an express company it appeared that plaintiff shipped a parcel by defendant's line, but that, the goods not being delivered at their destination, the carrier at plaintiff's instance ordered them returned, and that, when returned, plaintiff exhibited his receipt and gave all the identification that he was able to, but that defendant refused to deliver plaintiff the package; and defendant proved that in the conduct of its business there was a rule to the effect that when the consignee of a package was unknown he must be identified, and that the presentation of defendant's receipt was not sufficient. *Held*, that a contention that the court should have found for defendant, as the existence of the rule was not disputed, was untenable; plaintiff not being a consignee, nor a stranger.—*Thomas v. Pacific Express Co.*, 30 Mo. App. 88.

**App. 1897.** If no notice is given by the carrier of the arrival of the goods at any time, and by reason of the failure to give such notice the owner and consignee believe the goods to be lost and ask the carrier to trace and locate the goods, which the carrier refuses to do, such request and failure should be treated as equivalent to demand for the goods and refusal to deliver, and the carrier must make good the loss, in case the goods become worthless while in the carrier's possession.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

**App. 1911.** A consignor of fruit to his order is bound to have some one at destination to receive it.—*Glinnochio-Jones Fruit Co. v. Missouri, K. & T. Ry. Co.*, 134 S.W. 1028, 153 Mo. App. 598.

⚡**§88. Acts constituting delivery.**

**Sup. 1862.** Goods were shipped to a certain landing, but no consignee was named, and no bill of lading issued. When the boat arrived, the goods were put on the bank by

the clerk of the boat, who requested a warehouseman to place them in a shed, which he refused to do. *Held*, that there was not such a delivery as released the carrier from liability to consignees who did not receive the goods.—*Bartlett v. The Philadelphia*, 32 Mo. 256.

**App. 1905.** A carrier received goods consigned to the shipper. The bill of lading and waybill required the carrier, on the goods reaching their destination, to notify a third person and allow inspection. The car containing the goods was placed on the switch track at the third person's warehouse. The carrier retained control of the car, and the third person, without the knowledge of the agent, removed some of the goods, which were subsequently returned. *Held*, not to show a delivery to the third person sufficient to charge the carrier with a conversion.—*Conrad Schopp Fruit Co. v. Missouri Pac. R. Co.*, 91 S.W. 402, 115 Mo. App. 352.

**App. 1918.** When a carrier delivered goods to the consignee, the title having passed, its liability as common carrier terminated, and when it then delivered the goods to another at the consignee's request it was acting as the latter's agent.—*Hayes v. Wells Fargo & Co. Express*, 206 S.W. 229.

**App. 1921.** Allowing without permission inspection of corn shipped under a bill of lading providing, "Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper," did not amount to a delivery, and therefore a conversion by the carrier, under Carmack Amendment to the Interstate Commerce Act.—*Bernie Mill & Gln Co. v. St. Louis Southwestern Ry. Co.*, 228 S.W. 847.

**App. 1926.** Delivery by carrier may be either actual or symbolical, depending on character of property and facts in particular case.—*Carr v. St. Louis-San Francisco Ry. Co.*, 284 S.W. 184.

⚡**§89. Failure or refusal of consignee to receive goods.**

**Sup. 1859.** If a consignee refuse to receive the goods consigned to him, it is the duty of the carrier to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges. What he ought to do in a given case will depend upon circumstances. If, act-

ing as agent for the owners, he pursues such course as men of ordinary prudence would follow, he will be protected by the law, whatever may be the result.—*The Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123.

**App. 1883.** Duty of carrier. See *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 576, memorandum.

**App. 1911.** Where plaintiff made certain shipments of fruit, with a memorandum to notify one K., and the fruit arrived and K. was notified, but refused to take the fruit, and defendant served written notice that, unless the fruit was removed within a time fixed, the same would be sold as perishable freight, and it was so sold, the railroad company was not liable for a conversion; *Comp. Laws Okl. 1909*, § 455, authorizing a sale of perishable freight where a consignee has been notified of its arrival and refuses and neglects to receive the same.—*Glinocchio-Jones Fruit Co. v. Missouri K. & T. Ry. Co.*, 134 S.W. 1028, 153 Mo. App. 598.

**App. 1920.** A carrier which is not negligent has the right to sell and dispose of a shipment of damaged perishable goods to the best advantage, where the consignee refuses to receive it, in which case consignor can only recover the amount for which the shipment sold.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

#### ←90. Delivery of goods shipped C. O. D.

**App. 1882.** An action against a carrier for its failure to collect for goods shipped C. O. D. is one upon a special contract, and not upon the carrier's common-law obligation as such; for, in the absence of such a contract, it is under no common-law duty to act as collecting agent for the shipper.—*McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

**App. 1898.** Plaintiff shipped certain goods, with draft attached to bill of lading, and, on notification by the consignee that the goods had arrived in a damaged condition, telegraphed him to use them, and later telegraphed him to get railroad inspection of the goods and receipt for them in damaged condition. *Held*, that the telegrams showed consent of the shipper to the delivery of the goods by the railroad company without having received bill of lading.—*Schwarzchild & Sulzberger Co. v. Savannah, F. & W. Ry. Co.*, 76 Mo. App. 623.

**App. 1903.** While a carrier may be liable for a delivery without collecting a draft at-

tached to the bill of lading, and also for non-delivery to the consignee, by reason of loss of property and the like, yet his liability arises from different sources, and, while the measure of damages in some cases might be the same in both instances, it would frequently not be.—*Fowler v. Chicago, R. I. & P. Ry. Co.*, 71 S.W. 1077, 98 Mo. App. 210.

**App. 1915.** A shipment of liquor by an express company "C. O. D." means that the purchase price of the liquor shall be collected by the company from the consignee upon delivery.—*Danciger v. American Express Co.*, 179 S.W. 797, 192 Mo. App. 172.

An express company is not required by its common-law duty to receive, transport, and deliver packages C. O. D., as the duty of making such delivery arises solely by private contract.—*Id.*

Express company compelled to receive C. O. D. shipments of liquor which by subsequent law could not be made without license tax, penalties, etc., *held* thereby excused from delivery C. O. D.—*Id.*

An express company under mandatory injunction to make C. O. D. deliveries of liquor which were subsequently declared unlawful without license tax, etc., was not bound to trust to the preliminary order or to the shipper's bond or solvency to indemnify it from loss by reason of delivery in violation of the law.—*Id.*

A shipper of intoxicating liquors, C. O. D. by an express company compelled to make such delivery under temporary injunction from a United States Circuit Court acquired no vested rights under the order, as the right to have the express company collect was a right arising solely through private contract.—*Id.*

**App. 1917.** A third person, who at request of buyer of goods shipped by express C. O. D. makes the payment and receives the goods, acquires an interest therein superior to unknown agreement between buyer and seller that payment was for old debt.—*Frank Adam Co. v. Orpheum Theater Co.*, 193 S.W. 908, 195 Mo. App. 413.

**App. 1920.** Where goods were shipped C. O. D., requiring carrier to collect specified amount for delivery to consignee, the carrier was not liable, though it delivered goods without making the collection, where amount to be collected was thereafter paid by consignee direct to consignor.—*Rolla Produce Co.*

v. American Railway Express Co., 226 S.W. 582, 205 Mo. App. 646.

Consignee, who receives C. O. D. shipment without payment of specified amount to carrier, is required to either return the goods or pay therefor.—*Id.*

91. Liability for failure or refusal to deliver.

**Sup. 1887.** Plaintiff's assignors shipped by a common carrier certain goods addressed to another person, but took a bill of lading which showed that the goods were consigned to the order of the consignors. On the arrival of the goods, another common carrier, in the usual course of business, and at the addressee's request, obtained and delivered them to him without notice that he was not the real owner. *Held*, that there had been no conversion by the second carrier.—*Nanson v. Jacob*, 6 S.W. 246, 93 Mo. 331, 3 Am. St. Rep. 531.

**App. 1879.** Where goods transported by a common carrier are found on arrival at their destination to be in very bad condition, it is unreasonable for the carrier to refuse to deliver them to the consignee unless he execute a receipt showing that the goods were received in good condition.—*Loeffler v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 185.

**App. 1902.** In an action by a consignor against a railroad company for conversion by failing to deliver a shipment of merchandise to the consignee, the evidence showed that the consignor's agent sold the goods to the consignee; that the goods were delivered to defendant for shipment under a bill of lading binding defendant to transport and deliver them to the consignee; that the consignee paid \$10 on account, and refused to pay the balance, for which a suit was pending; that the consignee had not complained to the consignor about the company's delivery of the goods to a third person. *Held*, that the evidence failed to establish a conversion.—*Collins v. Illinois Cent. R. Co.*, 67 S.W. 943, 94 Mo. App. 130.

**App. 1902.** Where a bill of lading required the consignee to unload the shipment from the company's cars within 48 hours, or pay a demurrage charge, but the right of the company to remove the cars and warehouse the shipment was not complete until 72 hours had expired, and the company removed a car not fully unloaded after the 48 hours had expired, but within the 72-hour period, it was guilty of conversion.—*Darlington v. Missouri Pac. Ry. Co.*, 72 S.W. 122, 99 Mo. App. 1.

**App. 1904.** That a railway company's act in appropriating to its own use coal belonging to a consignee was through an honest mistake, does not affect the consignee's right to redress for the conversion.—*Frazier v. Atchison, T. & S. F. R. Co.*, 78 S.W. 679, 104 Mo. App. 355.

**App. 1909.** A carrier, who has issued a bill of lading in favor of the buyer of goods, acts at its peril when, as carrier or as warehouseman, it diverts the goods, and it must ascertain the facts, and its justification in diverting the goods turns, not on its knowledge of the facts, but on the facts themselves.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 122 S.W. 342, 145 Mo. App. 394.

**App. 1913.** Where a carrier transporting goods under a contract stipulating that if a delivery could not be made the carrier should return the goods to the shipper at his cost was unable to deliver, and tendered the goods back to the shipper on condition that he would release it from liability on account of the nondelivery to the consignees, the tender was ineffectual.—*Danciger Bros. v. American Express Co.*, 158 S.W. 466, 172 Mo. App. 391.

**App. 1915.** Express company refusing to deliver shipments of intoxicating liquors to consignees in another state because of laws of such state *held* bound to return packages to shipper and for failure to do so liable for conversion.—*Danciger v. American Express Co.*, 179 S.W. 806, 192 Mo. App. 106.

**App. 1916.** Where fruit consigned to shipper, another to be notified, is rejected by the latter, the carrier is liable in conversion if it sells the fruit without notifying the consignor, if practicable; notice to the "notify party" not being sufficient under Rev. St. 1909, § 3113.—*F. W. Brockman Commission Co. v. Missouri Pac. R. Co.*, 188 S.W. 920, 195 Mo. App. 607.

**App. 1925.** Consignee's receipt of car of apples other than car wrongfully diverted by carrier *held* not defense.—*Michael-Swanson-Brady Produce Co. v. Oregon Short Line R. Co.*, 271 S.W. 854, 219 Mo. App. 419.

92. Liability as to goods seized under legal process.

Live stock, see post, 215.

**Sup. 1895.** The garnishment of goods in the possession of a common carrier will excuse its failure to deliver them according to

contract.—*Landa v. Missouri, K. & T. R. Co.*, 31 S.W. 900, 129 Mo. 663, 50 Am. St. Rep. 459.

**Sup. 1919.** Where consignee of goods arriving at defendant's station at C. on August 21st and 22d did not live at C., the reasonable time allowed for their removal before liability as carrier ceased had not elapsed when they were seized by a federal officer on August 22d and 23d.—(*App. 1915*) *Danciger v. Atchison, T. & S. F. Ry. Co.*, 179 S.W. 800, judgment reversed 212 S.W. 5.

A carrier is excused from liability for failure to deliver goods which are taken from its possession by process of law, without fraud or collusion on its part, by an officer acting under apparently valid authority, and where it gives notice thereof to the consignor.—*Id.*

Carrier's required notice to consignor that goods had been taken from its possession under process of law held satisfied by notice given shortly after they were taken, when, under the circumstances, no notice could possibly have enabled the consignor to protect his interests.—*Id.*

Where officer of United States Indian Service had authority to take intoxicating liquors from the possession of defendant carrier while awaiting delivery, defendant would not be liable, even though the officer had no authority to thereafter destroy them.—*Id.*

Where Indian officer had apparent authority to take liquor from carrier's possession as about to be introduced into the Indian Territory, the carrier, as against the consignor, was not bound to construe the law, nor foresee a subsequent ruling that the officer could not act outside the territory.—*Id.*

Agent of carrier held not required to resist Indian officer's taking of liquors on suspicion that they were about to be introduced into Indian Territory.—*Id.*

**App. 1889.** Where, in an action against a carrier for failure to deliver goods intrusted to it for transportation, it appeared that the goods had been seized by a city marshal, acting as deputy sheriff of a county, pursuant to a request from a sheriff of another county having a writ of attachment for the goods, evidence of a subsequent levy under the writ of attachment was inadmissible, for such subsequent levy could not change the carrier's liability to the shipper.—*Nickey v. St. Louis, I. M. & S. Ry. Co.*, 35 Mo. App. 79.

**App. 1909.** Gen. St. Kan. 1901, § 5278, providing that an order of attachment binds

the property attached from time of service, and the garnishee shall be liable from the time he is served for property in his hands, and section 5282, providing that a garnishee shall be served personally with summons and making him liable from the time served, places defendant's property in custodia legis from the time of service of notice on the garnishee, so that a railroad ceased to hold defendant's property as a carrier after service of notice upon it, but held it as the court's custodian, and was not liable as for conversion for non-delivery to the consignor on his exercising his right of stoppage in transitu.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.*, 122 S.W. 10, 138 Mo. App. 352.

**App. 1914.** In a suit against a carrier for loss of liquors unlawfully seized and destroyed by federal officers, it was no defense that the carrier acted in good faith in surrendering the liquors, or that they may have been seized by force.—*Fehrenbach Wine & Liquor Co. v. Atchison, T. & S. F. Ry. Co.*, 167 S.W. 631, 182 Mo. App. 1.

A carrier was liable as an insurer for loss of liquors illegally seized by federal officers on the ground that it was intended to transport them into the Indian country.—*Id.*

Where an officer, without proper legal process, seized and destroyed liquors in possession of a carrier, the officer was a mere trespasser, and the carrier was liable for his act.—*Id.*

### 93. Liability for misdelivery.

**Sup. 1859.** The acceptance of goods from a common carrier, at a place short of their place of destination, or after the time appointed for their delivery, will not free the carrier from the responsibility for damages incurred by a breach of his contract of affreightment.—*Atkisson v. The Castle Garden*, 28 Mo. 124.

**Sup. 1887.** A mere bailee, whether a common carrier or otherwise, is guilty of no conversion, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner; but, on the other hand, if he has such notice, his status is altogether altered, and he acts at his peril.—*Nanson v. Jacob*, 6 S.W. 246, 93 Mo. 331, 3 Am. St. Rep. 531.

**App. 1876.** Plaintiffs, who were merchants, received a letter mailed from S., and signed by Henry Hund, ordering a quantity of

liquor. Plaintiffs did not know any Henry Hund at S., but found there was a man by that name who kept a saloon there, whereupon they shipped the liquor over the defendant's railroad, addressed to Henry Hund, at S., at the same time sending by mail a copy of the bill of lading. At the time the order was mailed there was a stranger in S. calling himself Henry Hund, who had reached there and was fitting up a store. The Henry Hund who kept the saloon refused to receive the consignment, saying he had not ordered it; but the other Henry Hund claimed the goods and exhibited the bill of lading. *Held*, in an action by the shipper against the railroad, that plaintiffs could not recover of the railroad for the goods, even though the one to whom they were delivered was an imposter, since plaintiffs were guilty of negligence in not more particularly describing the package, the business, or the address of the consignee intended.—*Bush v. St. Louis, K. C. & N. Ry. Co.*, 3 Mo. App. 62.

**App. 1881.** A consignee, by receiving the goods short of their destination, does not preclude himself from the recovery of damages incurred by a breach of contract by the carrier before such receipt.—*Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134.

**App. 1884.** Effect of delivery. See *Watson v. Hoosac Tunnel Line Co.*, 14 Mo. App. 585, memorandum.

**App. 1909.** Where a carrier did not notify the consignee of the arrival of a shipment of grain, but on the order of the purchaser thereof removed the grain to another point, there was a conversion of the grain.—*National Bank of Commerce of Kansas City v. Southern Ry. Co.*, 115 S.W. 517, 135 Mo. App. 74.

**App. 1909.** Carrier, who has issued bill of lading in favor of buyer of goods, acts at peril when, as carrier or as warehouseman, it diverts goods.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 122 S.W. 342. See Carriers, 91 in this Digest.

**App. 1909.** Defendant carrier, having received of plaintiff for shipment goods belonging to L., but on which plaintiff had a lien for a claim against L., under a bill of lading providing for their delivery to plaintiff, and having without authority delivered them to L., on his executing a bond of indemnity, was liable to plaintiff for the amount of its lien.—*American Storage & Moving Co. v. Wabash R. Co.*, 123 S.W. 964, 146 Mo. App. 224.

**App. 1913.** Where card notifying consignee of arrival of shipment was delivered

by consignee's agent to a teamster, who gave it to a third person, who obtained the shipment upon the faith thereof, carrier *held* not liable for the wrong delivery.—*May Department Stores Co. v. Louisville & N. R. Co.*, 160 S.W. 527, 177 Mo. App. 693.

**App. 1916.** Under shipment to be delivered upon indorsement and delivery of bill of lading and payment of draft attached, if carrier delivers goods without such payment, the shipper may abandon the shipment and hold the carrier for the price.—*Dyer v. Atlantic Coast Line R. Co.*, 186 S.W. 529.

**App. 1917.** Where shipper by rail was ignorant that delivery had been made without payment of draft attached to bill of lading and proper production of bill, her directions to broker at destination by letter to make best possible disposition of hay after party to whom it was sent rejected it did not ratify or waive act of wrongful delivery by railroad.—*Barton v. Louisville & N. R. Co.*, 196 S.W. 379.

**App. 1921.** Where a shipper of potatoes to its own order attached a delivery order to a draft and notified the agent at the point of delivery to deliver them to a named company on presentation of the delivery order, and released the bill of lading to the agent at the shipping point in order that delivery might be made on presentation of the order, delivery of the potatoes without such order or any authority from the shipper was a violation of the carrier's duty.—*J. L. Price Brokerage Co. v. Chicago, R. I. & P. Ry. Co.*, 230 S.W. 374, 207 Mo. App. 8.

**App. 1922.** A shipper having the right to divert a car because of the consignee's telegram refusing the car, the carrier, which had agreed with the shipper to divert it, cannot deny liability for not doing so because no proof of the shipper's right to divert had been made to the carrier before it so agreed; it not having exacted any such proof, to which it was entitled if it had seen fit to require it.—*Amber v. Payne*, 239 S.W. 588.

**App. 1925.** Owner of express receipt entitled to recover for delivery to another marked consignee on shipping tag.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 980.

#### 94. Actions for failure to deliver or misdelivery.

##### 94 (1/2). Nature and form.

**Sup. 1834.** Trover will not lie against a common carrier for not delivering goods in-

trusted to him for transportation, where defendant could not deliver them at the time of demand, because lost or stolen.—*Johnson v. Strader*, 3 Mo. 359.

Case or trover may be brought against a carrier for not delivering goods, but trover cannot be sustained without proof of conversion.—*Id.*

**Sup. 1914.** Where a carrier returned a C. O. D. shipment and offered to deliver it to the shipper because of a statute preventing delivery without paying a heavy occupation tax, liability, if any, *held* to be for breach of the contract, and not for conversion.—*Rosenberger v. Pacific Express Co.*, 167 S.W. 429, 258 Mo. 97, judgment reversed (1916) 36 S. Ct. 510, 241 U. S. 48, 60 L. Ed. 880; Same *v.* Wells Fargo & Co., 167 S.W. 433, 258 Mo. 112.

**App. 1916.** Party suing carrier for failure to deliver shipment, *held* entitled to sue either in tort or for breach of the contract of transportation.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S.W. 131.

#### 94 (1). Conditions precedent.

**Sup. 1840.** A previous demand is not necessary to support an action against a common carrier for the nondelivery of goods according to the consignment.—*Erskine v. The Thames*, 6 Mo. 371.

**App. 1886.** Rev. St. § 1018, provides that it shall not be available as an objection that no demand was made for the subject-matter of the suit prior to its institution, unless it is expressly set up in the answer as a defense, accompanied by a tender of the amount due. *Held* not applicable to an action of replevin against a carrier to recover a shipment of goods, where there was a reasonable doubt as to whether plaintiffs were entitled to have the goods delivered to them; the carrier having the right to require proof of plaintiffs' rights.—*Cole v. Wabash, St. L. & P. Ry. Co.*, 21 Mo. App. 443.

**App. 1901.** Where a carrier of a car load of corn was to stop at a certain town between the point of shipment and that of destination for the purpose of shelling the corn, but failed to do so, and carried the corn through to the destination, it was the duty of the shipper to have received his corn, and then to have sued the carrier for failure to shell. He could not sue the carrier for conversion after delivery of the corn to a connecting carrier at the destination agreed on.—*Redmon v. Chicago, R. I. & P. R. Co.*, 90 Mo. App. 68.

#### 94 (1½). Jurisdiction and venue.

See explanation, page iii.

#### 94 (2). Parties and pleading.

**Sup. 1834.** In an action by a carrier for the recovery of freight for the transportation of goods, defendant cannot recover, by way of set-off as for goods sold and delivered, the value of goods not delivered, because the action of indebitatus assumpsit therefor would not lie.—*Johnson v. Strader*, 3 Mo. 359.

**App. 1877.** In an action against a carrier by the consignor of goods, the fact that he had, before shipment, sold the goods to the consignee and discounted the draft drawn against the consignee, would bar a recovery by the consignor for failure to deliver.—*Wheeler v. St. Louis & S. E. Ry. Co.*, 3 Mo. App. 358.

**App. 1903.** Where a petition alleged that plaintiffs delivered a car of corn to defendant for shipment to a particular destination, there to be delivered to plaintiff's order, and that, in disregard of such agreement, defendant failed to deliver to plaintiffs, or to any one for them, but wrongfully delivered the same to S., and the proofs showed that plaintiff had sold the corn to S., and intended it to be delivered to him on payment of a draft attached to the bill of lading, plaintiff was not entitled to recover on the ground that the carrier wrongfully delivered the corn without collecting the draft.—*Fowler v. Chicago, R. I. & P. Ry. Co.*, 71 S.W. 1077, 98 Mo. App. 210.

**App. 1904.** In an action by a consignee for the conversion of coal by a railway company, it cannot, under a general denial, recoup the price of the coal paid by it to the consignee, or raise the question of subrogation to the rights of the consignor, or claim an allowance for freight.—*Frazier v. Atchison, T. & S. F. R. Co.*, 78 S.W. 679, 104 Mo. App. 355.

**App. 1907.** The petition alleged demand and refusal to deliver goods shipped by a carrier, which allegations the answer denied, and set up as new matter the fact that they had been destroyed by an unprecedented flood, without defendant's fault, and the reply put in issue the new matter, and further set up that, if the consignment was destroyed, it was through defendant's negligence. There was no evidence that the consignment was destroyed. *Held*, that the failure of plaintiff to prove demand and failure to deliver precluded his right to recover.—*Thaxter v. Missouri Pac. Ry. Co.*, 100 S.W. 1102, 123 Mo. App. 636.

**App. 1910.** A petition alleging that defendant carrier issued a bill of lading to plain-

tiff's agents, agreeing to carry for hire and to deliver the goods to the consignees, and that they violated their agreement by failing to deliver them to the consignees or to plaintiff, is founded on contract, rather than on breach of the common-law duty of the carrier.—*Central America S. S. Co. v. Mobile & O. R. Co.*, 128 S.W. 822, 144 Mo. App. 43.

**App. 1928.** Carrier cannot urge shipper's waiver of notice of arrival unless waiver is pleaded.—*Hoyland Flour Mills Co. v. Missouri Pac. R. Co.*, 5 S.W.(2d) 125, certiorari denied *Erie R. Co. v. Hoyland Flour Mills Co.*, 48 S. Ct. 433, 277 U. S. 586, 72 L. Ed. 1001.

94 (3). Evidence.

**Sup. 1903.** Grain was delivered to a carrier for shipment to a destination beyond its own line under a through bill of lading. A sight draft with the bill of lading attached was forwarded through certain banks for collection from the consignee, who refused to accept the same because of the nonarrival of the grain. The draft was protested and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond without presentation of the bill of lading, but without payment of the draft. *Held*, that evidence that after the conversion plaintiff was notified from time to time, and knew that the grain was in a certain place at his final disposal, was immaterial.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.*, 75 S.W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

Where grain shipped is converted by a carrier in delivering it to the consignee without presentation of the bill of lading, and thereafter is redelivered to the carrier and by it stored in a warehouse, evidence, in an action for conversion, that it was customary for the carrier to store grain in a warehouse while awaiting demand of the bill of lading is immaterial; for, after the grain was converted, nothing that was thereafter done could have the effect of releasing the carrier from its liability for the conversion.—*Id.*

**App. 1877.** Where goods are delivered to a common carrier, who contracts to deliver them to the consignee, the burden of showing such delivery is upon him.—*Wheeler v. St. Louis & S. E. Ry. Co.*, 3 Mo. App. 358.

**App. 1878.** In an action against an express company for failure to deliver goods according to a contract by which it was to carry them to its agency most convenient to the destination of the goods, evidence *held* sufficient to authorize the inference that defend-

ant had an agency at a point nearer than that at which it delivered the goods.—*Schutter v. Adams Express Co.*, 5 Mo. App. 316.

**App. 1882.** Where plaintiff shipped goods by defendant, the contract of shipment providing that defendant should not be liable for any claim unless it should be presented in writing within 60 days from its date, and after the shipment made a contract with defendant by which it was to act as collecting agent for plaintiff, it was not necessary for plaintiff, in an action for a breach of the latter contract, to prove compliance with the 60-day provision of the former, although it was necessary for him to introduce such former contract in evidence to prove the date of delivery and destination of the goods.—*McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

**App. 1889.** In an action against a carrier for failure to deliver goods shipped to plaintiff, the burden is on defendant to show delivery.—*Pindell v. St. Louis & H. Ry. Co.*, 34 Mo. App. 675.

**App. 1904.** In an action against a carrier by a shipper, in the nature of trover, the petition alleging merely the delivery of the shipment to the carrier, and a failure to deliver to the consignee, plaintiff had the task of proving no more, in order to make a prima facie case, than the delivery to the carrier, and failure to redeliver.—*Grier v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S.W. 158, 108 Mo. App. 565.

**App. 1905.** To show that a railroad company, receiving goods for shipment for delivery to the consignor, converted them by delivering them to another, it is necessary to prove that the goods were actually or constructively delivered to another.—*Conrad Schopp Fruit Co. v. Missouri Pac. R. Co.*, 91 S.W. 402, 115 Mo. App. 352.

**App. 1908.** In an action against a carrier for loss of goods, where the plaintiff proves delivery to the carrier and nondelivery to the consignee, the burden is then upon the carrier to justify nondelivery.—*Hammatt & Katter v. Wabash R. Co.*, 106 S.W. 1106, 128 Mo. App. 1; *Id.*, 106 S.W. 1107, 128 Mo. App. 5.

**App. 1911.** Evidence in an action by a consignee against a carrier for its failure to deliver goods *held* sufficient to support a verdict against the carrier.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 137 S.W. 890, 157 Mo. App. 160.

**App. 1916.** In an action against carrier charging delivery without indorsement of bill

of lading and payment of draft attached, evidence that the goods were delivered to a railroad company, stranger to the bill of lading, and by it put on side track of drawee of draft, *held* to show delivery as charged.—*Dyer v. Atlantic Coast Line R. Co.*, 186 S.W. 529.

**App. 1917.** In action against railroads for conversion of carload of hay, evidence *held* to warrant finding that hay was delivered to party required to be notified by bill of lading without requiring payment of draft attached and production of bill.—*Barton v. Louisville & N. R. Co.*, 196 S.W. 379.

**App. 1918.** Evidence *held* to show that seller had ratified carrier's delivery, of goods shipped to buyer, to a third person by acceptance from the latter of a large part of purchase price.—*Hayes v. Wells Fargo & Co. Express*, 206 S.W. 229.

**App. 1921.** In an action against a railroad company for the alleged conversion of a car of lumber, evidence *held* insufficient to sustain a judgment for plaintiff not showing the value of the lumber; the only testimony being as to its value if it was of certain grade, and it appearing that the lumber was not of that grade.—*Buschow Lumber Co. v. Hines*, 229 S.W. 451, 206 Mo. App. 681.

**App. 1925.** Absence of competent evidence to show loss resulting from misdelivery of express *held* to require reversal.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

**App. 1926.** Evidence *held* to show compliance with tariff provisions, even if changing bill of lading is construed to be an exchanged bill of lading.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

#### 94(4). Damages.

**Sup. 1859.** In an action against a carrier for failure to transport goods from one point to another, pursuant to the terms of his contract, the measure of damages is the value of the goods at the place of destination, deducting freight and other expenses of transportation.—*Atkisson v. The Castle Garden*, 28 Mo. 124.

**App. 1884.** Where a common carrier agreed to transport the goods of another, and in accordance with the agreement received the goods for transportation, the carrier is liable for the reasonable value of the goods at the place of destination, if it fails to deliver them and was not hindered by the act of God or the public enemy, and it cannot escape its

responsibility by showing that it employed means of transportation furnished to it by others.—*Austin v. St. Louis & St. P. Packet Co.*, 15 Mo. App. 197.

**App. 1897.** Rev. St. 1889, § 4430, permits the jury to allow interest in an action against a carrier for conversion of property; but the petition should ask for it, and, if interest is allowed, it should be calculated from the date of the conversion or wrongful delivery of the goods, and not from the date it was received for shipment.—*Horner v. Missouri Pac. Ry. Co.*, 70 Mo. App. 285.

**App. 1903.** Where a railroad company converted coal consigned to plaintiffs, under a contract by which plaintiffs were entitled to a certain part of the output of the mine, the measure of plaintiffs' damage was the value of the coal at destination, and not its value at the mine.—*Blackmer v. Cleveland, C., C. & St. L. Ry. Co.*, 73 S.W. 913, 101 Mo. App. 557.

**App. 1906.** Where a carrier failed to deliver freight which had been damaged while in its possession by an act of God, the damages were the value of the freight in its damaged condition.—*Starr-Hardnett & Elmiston Co. v. Missouri, K. & T. Ry. Co.*, 97 S.W. 959, 122 Mo. App. 26.

**App. 1911.** The measure of damages in an action by consignee for failure of a carrier to deliver goods for which the consignee held bills of lading, after a settlement with a consignor, is the value of the goods at the place of consignment less the freight, with interest on the net amount.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 137 S.W. 890, 157 Mo. App. 160.

**App. 1915.** The measure of damages for conversion of shipment by carrier is the goods' value at destination, less cost of transportation, with interest under the statute, in the jury's discretion.—*People's State Savings Bank v. Missouri, K. & T. Ry. Co.*, 178 S.W. 202, 192 Mo. App. 614.

**App. 1920.** Where goods were shipped under C. O. D. contract, the carrier's obligation arises from contract, and if it can be sued in conversion for delivery without making required collection, the amount of recovery will be the contract amount, and not the value of the property.—*Rolla Produce Co. v. American Railway Express Co.*, 226 S.W. 582, 205 Mo. App. 646.

**App. 1926.** Where shipper notified railroad he had sold eggs at named price per



dozen, he was not confined to recovery of reasonable market value thereof.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

94 (5). Trial and judgment.

**App. 1876.** In an action by the shipper of goods against the carrier for misdelivery, the question of the carrier's diligence is one for the jury.—*Bush v. St. Louis, K. C. & N. Ry. Co.*, 3 Mo. App. 62.

**App. 1879.** In an action against a common carrier for breach of a contract to deliver goods, an instruction that the measure of damages was the value of the property carried, with interest, was not erroneous, where the evidence showed that the goods were in very bad condition and the defendant had refused to deliver them, unless plaintiffs executed a receipt showing that the goods had been received by him in good condition.—*Loeffler v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 185.

Where, in an action against a carrier for breach of contract to deliver goods, it appears that no part of the goods have been delivered, plaintiff is entitled to judgment for the full value of the goods, though he did not bring his action as one for conversion.—*Id.*

In an action against a common carrier for breach of a contract to deliver goods, the fact that the plaintiff alleges that a demand for the goods was made on a certain date, but does not allege that the goods were wholly lost, does not confine him to the recovery of a judgment for damages for nondelivery at the particular time alleged, or preclude him from recovering for the full value of the goods on a showing that a portion of the goods had arrived at their destination and that defendant had refused to deliver them unless plaintiff executed a release showing that the goods had arrived in good condition.—*Id.*

**App. 1883.** Reasonable diligence as question for court or jury. See *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 576, memorandum.

**App. 1897.** In an action against a railway company doing business in this state for failure to carry and deliver goods consigned to a firm in another state, in which the custom was to deliver notice of the arrival of goods "by a messenger," it was error to instruct the jury to find for the plaintiff, if defendant failed to deliver notice as required by the custom; there being evidence that a notice, though not as required by custom, was given.

—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

**App. 1899.** In an action against a carrier for the nondelivery of goods, the answer set up a special contract relieving defendant from liability as a carrier upon transportation on time of the goods, and making it in that event the duty of plaintiff to remove the goods from the station at the point of destination within a specified time, in default of which defendant should be entitled to store them at plaintiff's risk, and averred compliance therewith. The reply admitted the special contract, but did not admit the arrival of the goods on time, and alleged the refusal of defendant to deliver the goods upon demand therefor and tender of charges, the failure of defendant to give the customary notice of the arrival of the goods, and the failure of defendant, upon request made to it, to trace and locate the goods in a reasonable time. It was uncontradicted that the contract of carriage was performed in due time, and there was no substantial evidence that defendant failed to give reasonable notice of the arrival of the goods. *Held*, that under such a state of facts defendant could be held liable only as a warehouseman upon proof of gross negligence, and that, as the proof failed to show any act of gross negligence, a demurrer to the entire evidence should have been sustained.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 78 Mo. App. 305.

**App. 1903.** Where a carrier claimed that it had notified a consignee by mail of the arrival of a shipment, but the persons having charge of the consignee's mail claimed that such notice was never received, and could not be found in the files in which they were always kept, it was a question for the jury whether the notice was actually received by the consignee.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 73 S.W. 346, 100 Mo. App. 164.

Where there was conflicting evidence as to when a carrier had given personal notice to a consignee of the arrival of a shipment, it was a question for the jury if the notice was given in time, and their finding thereon is conclusive.—*Id.*

**App. 1903.** Defendant railroad company notified a coal company that thereafter none of its cars on the side track at the mines should be loaded with coal for any other customer than defendant. Prior to such notification defendant had permitted its cars to be loaded to be carried to any consignee, and the coal company was under contract with plain-

tiffs to furnish them constantly a certain portion of the output of the mines. The coal company did not assent to the notification, but loaded the cars set out, and notified defendant's agent to bill the coal to plaintiffs. Instead of doing so, the agent marked the bill of lading for defendant's use, by whom it was appropriated. *Held*, that whether the coal was put on the cars for plaintiffs in such a manner as to constitute a delivery to them, so as to render defendant liable for converting plaintiffs' property, was for the jury.—*Blackmer v. Cleveland, C. & St. L. Ry. Co.*, 73 S.W. 913, 101 Mo. App. 557.

**App. 1909.** Whether a buyer suing a carrier for nondelivery of goods had advanced money to the seller on account of the goods is a question of fact for the court.—*F. H. Smith Co. v. Louisville & N. R. Co.*, 122 S.W. 342, 145 Mo. App. 394.

**App. 1913.** In action for wrong delivery of shipment, evidence *held* to make a question for the jury as to whether notice sent by carrier and produced by person to whom delivery was made included the shipment in question.—*May Department Stores Co. v. Louisville & N. R. Co.*, 160 S.W. 527, 177 Mo. App. 693.

**App. 1916.** In a shipper's action for a carrier's conversion of certain brasses delivered to it for transportation, evidence *held* to make a prima facie showing for plaintiff and so make the question one for the jury.—*Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 181 S.W. 1080, 193 Mo. App. 69.

**App. 1918.** In action against railroad company, receivers, and railway company which purchased property on reorganization, for conversion of apples, where plaintiff, alleging railway company has purchased interest of receivers and railroad company and has assumed all obligations, but offered no evidence in support, a peremptory instruction for defendant is justified.—*Clemmons Produce Co. v. St. Louis-San Francisco Ry. Co.*, 204 S.W. 590.

**App. 1922.** Whether the amount of aluminum scrap stated in a bill of lading to have been delivered to a carrier was in fact delivered to it *held* for the jury.—*Sonken-Galamba Iron & Metal Co. v. Hines*, 238 S.W. 135.

#### (E) DELAY IN TRANSPORTATION OR DELIVERY.

Carriage of live stock, see post, ¶113.

Liability of connecting carriers, see post, ¶176.

Limitation of liability, see post, ¶147-168, 180.

Loss of or injury to goods through delay or deviation from route, see post, ¶116.

#### ¶95. Diligence required of carrier.

**App. 1883.** Where a carrier has not the capacity to forward goods without delay, it is its duty to refuse to receive them, or to notify the consignors and contract with a view to that fact.—*Schwab v. Union Line*, 13 Mo. App. 159.

**App. 1922.** When a shipment has been accepted for transportation, the carrier is in duty bound to forward the shipment with reasonable dispatch, and cannot unreasonably delay shipment in order to accept and carry other business offered it.—*Howell v. Hines*, 236 S.W. 886.

#### ¶96. Time of transportation and delivery in general.

**Sup. 1883.** A carrier who receives the goods of a shipper without notice to the shipper of circumstances likely to occasion delay by reason of an unusual influx of business, or who fails to obtain the shipper's assent to any delay which may be occasioned thereby, will be bound to transport the goods within a reasonable time, notwithstanding the situation.—*Dawson v. Chicago & A. R. Co.*, 79 Mo. 296.

**Sup. 1894.** Where the complaint alleged that goods were delivered to defendant for transportation to plaintiffs in May, 1892, evidence that they were not delivered to plaintiffs at the time of bringing the suit, in January, 1893, will support a finding that the delay was unreasonable.—*Davis v. Jacksonville Southeastern Line*, 28 S.W. 965, 126 Mo. 69.

**App. 1883.** A carrier is an insurer to the extent that the goods be delivered safely, but he does not insure their arrival according to any usual course of dealing; nor, in the absence of any special contract as to the time, does he insure their arrival at any particular day or hour.—*Schwab v. Union Line*, 13 Mo. App. 159.

**App. 1925.** Carrier required to transport interstate shipment of perishable nursery stock within reasonable time to destination.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

**App. 1927.** Common law implies contract to deliver freight at destination within reasonable time.—*Frawley v. Atchison, T. & S. F. R. Co.*, 299 S.W. 93, 220 Mo. App. 1189.

Consult Pocket Part for later cases. For explanation, see page iii.

96¾. **Usage or course of business.**

*See explanation, page iii.*

97. **Perishable goods.**

*See explanation, page iii.*

98. **Liability of carrier for delay.**

**App. 1924.** Common carrier is not liable for delays caused by sudden unanticipated influx of business, and from other causes not within its control.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

99. **Excuses for delay by carrier.**

**Sup. 1867.** The amount of business ordinarily done by a railroad company is the only proper measure of its obligation to furnish the means of transportation. If at any time there be a sudden and unexpected influx of business to the road, the duty of the company will be sufficiently performed by shipping the freight in the order of time in which it is offered; and its duty in their respect must be understood with reference to each particular station, not to the entire line of the road. The facilities of transportation, such as cars, etc., must be distributed among the various stations in proportion to the business ordinarily done at each station.—*Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

**Sup. 1873.** Where, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight, the company may decline to receive it, without incurring any liability; but, where the freight is received and shipped, the railroad must forward it without delay, or answer for damages caused thereby.—*Faulkner v. South Pac. R. R.*, 51 Mo. 311.

**Sup. 1875.** The sudden and wrongful refusal of its employes to work will not excuse a railroad company for failure to transport freight in the usual time.—*Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199.

**Sup. 1883.** Where the facilities of a common carrier are adequate to the business reasonably to be expected, a delay caused by an emergency arising from a sudden and unexpected influx of business cannot be regarded as a delay caused by the negligence of the carrier.—*Dawson v. Chicago & A. R. Co.*, 79 Mo. 296.

**App. 1876.** Where goods are delivered to the carrier, a bill of lading being taken by the consignor, having a draft on the consignee attached thereto, which is forwarded by the consignor to the consignee for acceptance and

payment, the title to the goods is vested in the consignee from the moment of delivery, and the carrier is liable to the consignee as a carrier to forward the goods without delay, and it cannot excuse a default in this respect under pretext of directions from the consignor to hold the goods until further orders.—*Armentrout v. St. Louis, K. C. & N. Ry. Co.*, 1 Mo. App. 158.

**App. 1882.** A commission merchant who receives a bill of lading, and accepts a draft for goods delivered to a carrier for shipment to him, has a right of action against the carrier for damage to the goods, though caused by a delay in forwarding which was made by the order of the consignor.—*Ober v. Indianapolis & St. L. R. Co.*, 13 Mo. App. 81.

**App. 1885.** Where, in an action for delay in the delivery of goods by a carrier, plaintiff contended that the goods were not delivered at the designated destination, and it appeared that defendant, after the arrival of the goods imposed an excessive charge of freight as a condition of delivery, the rule that it is the duty of a consignee to be ready to remove his goods on arrival at their destination without notice from the carrier is inapplicable.—*Loomis v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 340.

**App. 1897.** Where a carrier agreed to furnish cars and transport cattle at a particular date, it cannot defend an action for its nonperformance of the contract by showing that the train broke down, causing the failure of the train to arrive and transport the cattle at the time specified. If the carrier desired to exempt itself from liability for the consequences of such an occurrence, it should have so provided in the contract.—*Gann v. Chicago Great Western Ry. Co.*, 72 Mo. App. 34.

**App. 1898.** Where a carrier agrees to carry goods to their destination and deliver them within a prescribed time, he will be held to a strict performance of his contract, and no temporary obstruction, or even absolute impossibility, will be a defense for failure to comply with his engagement.—*Shelby v. Missouri Pac. Ry. Co.*, 77 Mo. App. 205.

**App. 1905.** Where, at the time defendant accepted certain oats for shipment, it had knowledge that traffic was demoralized in its yards at the point of destination, but neglected to notify the shipper of such fact, defendant was bound to make delivery in the ordinary course of business, and was liable for damages sustained by delay.—*Russell Grain Co. v. Wabash R. Co.*, 89 S.W. 908, 114 Mo. App. 488.

Where a carrier recognized the transfer of title to goods in its possession by the consignee, without asking for the production and surrender of the bill of lading, and agreed to deliver, and did deliver, the property to the buyer after an unreasonable delay, it was no defense to the buyer's right to recover for such delay that it could not require defendant to carry out its contract for failure to show an assignment of the bill of lading.—*Id.*

**App. 1909.** Results attributed to a defective roadbed and equipment do not excuse nonperformance of a carrier's duty to safely deliver a shipment at its destination within a reasonable time.—*Thompson v. Quincy, O. & K. C. R. Co.*, 117 S.W. 1193, 136 Mo. App. 404.

**App. 1909.** A statute providing that, when a carrier summoned as garnishee in an action has goods in its possession shipped by or consigned to defendant, it shall not be liable for its failure to transport the goods until it is discharged, exonerates the carrier garnished in an action against the shipper or consignee from liability for delay caused by the garnishment, but a carrier merely alleging that a third person was in possession of the goods at the time he was garnished and omitting to allege any fact showing that the possession of the third person was the possession of the carrier is not within the statute.—*A. C. L. Hause & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 122 S.W. 362, 143 Mo. App. 42.

**App. 1910.** Carrier is not liable for delays caused by sudden increase of business that could not be anticipated by ordinary prudence.—*Baker v. St. Louis & S. F. R. Co.*, 129 S.W. 436. See Carriers, 64 in this Digest.

**App. 1910.** A carrier had an arrangement with an elevator company by which it turned into the elevator for storing and drying any grain that arrived in its yards. It was the rule of the railroad to turn into the elevator such cars in the order of their arrival in the yards. The elevator was not a party to prescribing this rule, nor had it agreed to be bound by it. A shipper who delivered corn to the carrier for delivery at the elevator for drying had no knowledge of this rule. The carrier was negligent in delaying the transportation of the corn, and in delivering the same after arrival to the elevator, so that the corn spoiled. *Held*, that the carrier was liable for the injuries sustained, because it was bound to deliver the corn in a reasonable time, and where the consignee called for the same within a reasonable time, notifying the carrier that the corn was shipped to be

dried, and required immediate handling, the refusal to deliver because there were other carloads of grain that had precedence under its rule did not relieve it from liability.—*W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 128 S.W. 42, 148 Mo. App. 308.

A carrier delaying the delivery of freight may not excuse the delay on the ground that the bills of lading were not presented, where it did not decline to deliver because thereof.—*Id.*

**App. 1910.** A carrier will not be excused from liability for the consequences of an unusual delay in transportation caused by an act of God, where the disability is existent and known to the carrier at the time the property is received for shipment, and the carrier fails to advise the shipper of the existing conditions and to stipulate against their consequences.—*Thero v. Missouri Pac. Ry. Co.*, 129 S.W. 266, 144 Mo. App. 161.

**App. 1913.** A railroad company is not liable for damages arising from delay in the shipment of goods, owing to the loss of a car on account of extraordinary weather conditions.—*Unionville Produce Co. v. Chicago, B. & Q. R. Co.*, 153 S.W. 63, 168 Mo. App. 168.

Where a carrier accepts goods, knowing that a congested condition of traffic, due to weather conditions, will delay the transportation, but fails to notify the shipper, it cannot set up such weather conditions as an excuse for its delay.—*Id.*

**App. 1924.** In absence of a stipulation, a strike causing delay in transportation of goods is no defense to an action for damages from the delay.—*Morrison v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 449.

**App. 1925.** Carrier liable for delay in transportation of goods because of employees' strike.—*Buschow Lumber Co. v. Union Pac. R. Co.*, 276 S.W. 409, 220 Mo. App. 743.

**App. 1927.** Refusal of carrier's servants to work, unaccompanied by violence or intimidation, does not excuse carrier from duty to transport freight with reasonable dispatch.—*Frawley v. Atchison, T. & S. F. R. Co.*, 299 S.W. 93, 220 Mo. App. 1189.

#### —100. Demurrage, and liability of consignee or owner for delay.

##### —100 (1). Right of carrier to charge demurrage, and persons liable.

**Sup. 1909.** Word "capacity" in demurrage act did not refer to estimated carrying

capacity of car, but to weight of load, so that consignee of lumber weighing less than 60,000 pounds in 60,000 pound capacity car, would be entitled to only 48 hours free time in which to unload.—*E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 116 S.W. 530. See Carriers, 12(1) in this Digest.

**App. 1897.** Plaintiff shipped a quantity of logs over defendant's road from Platte City to Kansas City. Before the shipment plaintiff had an agreement with defendant's division freight agent that the freight charges should be 5 cents per 100. The bill of lading, as written up by defendant's local agent at Platte City, contained a clause to the effect that defendant guaranteed that the freight rate should not exceed five cents per 100 and \$2 demurrage. Defendant claimed, in addition to the freight rate of 5 cents per 100, a demurrage of \$2 per car for delay in loading at Platte City. The bill of lading contained a further provision that "all car load freight shall be subject to a minimum charge for trackage and rental of \$1 per car for each 24 hours' detention, or fractional part thereof, after the expiration of 48 hours from its arrival at destination. *Held*, that defendant was entitled to only an allowance for unreasonable delay within the contract limit of \$2.—*McGee v. Chicago, R. I. & P. Ry. Co.*, 71 Mo. App. 310.

**App. 1902.** A railroad company, in view of the duties required by law to provide proper service to shippers, is entitled to demand a reasonable fee for car service, or storage charges on carload freight after allowing the consignee a reasonable time to unload it.—*Darlington v. Missouri Pac. Ry. Co.*, 72 S.W. 122, 99 Mo. App. 1.

A consignee of freight was not excused from noncompliance with his duty to unload it from the cars within the time stipulated in the bill of lading by reason of the extreme condition of the weather.—*Id.*

**App. 1925.** Carrier cannot plead strike as reason for failure to carry out contract and diversion order, so as to charge demurrage.—*Buschow Lumber Co. v. Union Pac. R. Co.*, 276 S.W. 400, 220 Mo. App. 743.

**App. 1927.** Demurrage charges are part of transportation charges (Rev. St. 1919, §§ 10442, 10443, 10447).—*St. Louis-San Francisco Ry. Co. v. Morgan*, 297 S.W. 717, 221 Mo. App. 43.

#### 100(2). Notice of regulations.

**App. 1883.** Where a firm had a store in St. Louis and another in New York, and the

New York partner shipped goods from that point to St. Louis in ignorance of a blockade on the railroad, there was no contributory negligence on the part of the firm, though the St. Louis house knew of the blockade.—*Schwab v. Union Line*, 13 Mo. App. 159.

#### 100(3). Lien for demurrage.

**App. 1902.** A railroad company may have a lien for demurrage charges, even without express stipulation therefor in the contract of shipment.—*Darlington v. Missouri Pac. Ry. Co.*, 72 S.W. 122, 99 Mo. App. 1.

#### 101. Actions for delay.

##### 102. — Nature and form.

**App. 1885.** It is not the duty of a consignee of goods to pay an overcharge in freight under protest and then sue to recover the excess, but he may at once bring an action for a delay in delivery.—*Loomis v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 340.

**App. 1927.** Counterclaim for delay in shipment cannot be interposed to carrier's action for demurrage charges (Rev. St. 1919, §§ 10442, 10443).—*St. Louis-San Francisco Ry. Co. v. Morgan*, 297 S.W. 717, 221 Mo. App. 43.

##### 103. — Pleading.

**Sup. 1895.** In an action against a carrier for unreasonable delay in delivery of goods, the petition need not aver a consideration for the assumption of obligation by the carrier.—*Davis v. Jacksonville Southeastern Line*, 28 S.W. 965, 126 Mo. 69.

**App. 1905.** An allegation of the petition, in an action against a carrier for delay in delivering goods, that it was the duty and custom of defendant to maintain a place at destination where all consignees, and plaintiff in particular, might unload goods with some degree of convenience, which was designated a "team track," and that defendant, though being instructed by plaintiff to deliver the goods on the "team track," did not do so until some days thereafter, should be construed as charging that defendant unreasonably delayed putting the goods in the proper place for unloading after it had reached its destination.—*Russell Grain Co. v. Wabash R. Co.*, 89 S.W. 908, 114 Mo. App. 488.

**App. 1910.** The variance between a petition, in an action by a shipper against a carrier, which alleges that the carrier agreed to deliver at designated places to third persons, and the proof, which shows that the bills of lading named the shipper as con-

signee and contained directions to notify the third persons, is immaterial, as the carrier undertook to turn the freight over at destination to the third persons, on their presenting the bills of lading showing they were the persons authorized to take charge of the shipments.—*W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 128 S.W. 42, 148 Mo. App. 308.

**App. 1920.** The defense to action for negligent delay in transporting shipment, that delay was caused by preference given government shipment, being matter of excuse arising after engagement to transport in a reasonable time, to be available must be pleaded.—*Hunt v. Hines*, 223 S.W. 798, 204 Mo. App. 318.

**App. 1924.** To hold a common carrier liable for special damages resulting from delay in shipment the carrier must have notice at the time of shipment that special damages will result from delay, and a petition asking for special damages, but failing to allege such notice, is fatally defective.—*McCarten v. St. Louis-San Francisco R. Co.*, 264 S.W. 50.

**App. 1925.** Petition in action for damages by delay in transportation *held* sufficient, though not directly alleging that contract was made by agent at point of shipment.—*Gray v. Wabash Ry. Co.*, 277 S.W. 64, 220 Mo. App. 773.

#### 104. — Evidence.

**Sup. 1919.** Public Service Commission Act, § 40, changed the rule as to the burden of proof in actions against carriers for damages from delay in transporting a shipment by providing that on proof by the shipper of the delay, and that damage or loss was caused thereby, the burden should shift to the carrier to show the delay was not due to its negligence.—*Cunningham v. Chicago & A. R. Co.*, 215 S.W. 5.

**App. 1908.** Evidence *held* insufficient to show that a carrier's agent promised plaintiff that a refrigerator car ordered would arrive on a particular train.—*Luckey v. St. Louis & S. F. R. Co.*, 113 S.W. 703, 133 Mo. App. 589.

**App. 1909.** Where in an action for negligent delay in transporting perishable freight it was agreed that the freight should have arrived on April 28th, and plaintiff's evidence showed that it did not arrive until five days later, while evidence of the carrier fixed the arrival on April 28th, the verdict for plaintiff established an unreasonable delay authorizing a recovery, provided such delay was the

result of the negligence alleged by plaintiff.—*Parsons v. Louisville & N. R. Co.*, 118 S.W. 101, 136 Mo. App. 494.

**App. 1909.** One suing for negligent delay in transporting freight must prove negligence and damage, and the mere fact that the freight was shipped in apparently good order and properly packed, and was in a deteriorated condition which delivered after a delay, is not sufficient to require the carrier to show that it was not negligent.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Dispatch Transp. Co.*, 122 S.W. 362, 143 Mo. App. 42.

**App. 1910.** Mere proof of delay in transportation does not support an inference of negligence of the carrier, but slight evidence of negligence is sufficient to raise the inference that the delay was negligent.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1910.** In an action against a carrier for delay in returning goods to the shipper after being refused by the consignee, evidence *held* not to show an agreement by it, for a consideration, to have them returned to the shipper.—*Corinth Woolen Mills v. Wabash R. Co.*, 126 S.W. 803, 147 Mo. App. 456.

**App. 1913.** The burden was on the shipper to prove, not only that delay in transporting perishable goods was unusual, but that it was negligent.—*Unionville Produce Co. v. Chicago, B. & Q. R. Co.*, 153 S.W. 63, 168 Mo. App. 168.

A railroad company is *prima facie* liable for damages from a delayed shipment of goods, due to car being lost.—*Id.*

**App. 1919.** In an action against an express company for delay in delivery of a shipment of eggs, evidence *held* insufficient to show that the delay was caused by giving preference to governmental shipments.—*Edwards v. American Ry. Express Co.*, 216 S.W. 781.

In an action against an express company for damages for delay in delivery of shipment of eggs which the shipper asserted resulted from a fall in market, evidence *held* not to conclusively show that the broker to whom the eggs were assigned by promptness could have obtained the same price as had the shipment been delivered seasonably and thus avoided the fall in market.—*Id.*

**App. 1920.** While plaintiff in action for negligent delay in interstate shipment has the burden of proving negligence, it is only neces-

sary to show circumstances raising a slight inference of negligence, some cause for the delay unexplained by defendant.—*Burgher v. Wabash Ry. Co.*, 217 S.W. 854.

Evidence in action for delay in transportation *held* insufficient to show negligence of defendant.—*Id.*

**App. 1920.** In an action for loss or damage to a shipment of dressed poultry, evidence *held* sufficient to sustain finding that the carrier was guilty of negligent delay in delivering shipment at destination.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

**App. 1920.** Defendant, in action for negligent delay in transporting shipment, having conceded the delay of 22 hours, the excuse that it was caused by preference given government shipment, even if good, must be proven conclusively to have caused the injury, else finding of negligent delay is justified.—*Hunt v. Hines*, 223 S.W. 798, 204 Mo. App. 318.

**App. 1921.** Rev. St. 1919, § 10449, which changes the established rule by providing that, on proof by plaintiff shipper of delay and damages caused thereby, the burden of proof shifts to the defendant carrier to show that the delay was not due to its negligence, includes express companies.—*Arky v. Wells Fargo & Co. Express*, 229 S.W. 824.

**App. 1921.** At common law the burden was on the plaintiff to show that any delay complained of was due to carrier's negligence.—*Bland v. Chicago & A. R. Co.*, 232 S.W. 232.

In an action for damages for delay in delivery of an interstate shipment, plaintiff has the burden of showing that the delay was due to the carrier's negligence, which burden remains on plaintiff throughout the entire case.—*Id.*

**App. 1923.** In a shipper's action for damages against a carrier for its failure to exercise ordinary care in bringing about a diversion and reconsignment of three carloads of potatoes, in that the reconsignment orders were given by mail instead of by wife, whereby the shipment was delayed, loss through falling markets resulting, evidence *held* insufficient to show that defendant was in possession of the shipment at the time the reconsignment orders were given to its alleged agent.—*Clcardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 249 S.W. 134, 211 Mo. App. 589.

**App. 1925.** Shippers required to prove carrier negligent to recover for delay in trans-

porting interstate shipment.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

**App. 1926.** Burden of proving negligent delay in shipment is on shipper, and mere proof of one unexplained delay does not make case of "negligent delay."—*Mourer v. Wabash Ry. Co.*, 280 S.W. 1050.

## 105. — Damages.

### 105 (1). Elements and measure of damages in general.

**Sup. 1850.** Where a common carrier of goods has been guilty of delay in delivering them, if the price of the goods is the same when they are delivered as when they ought to have been delivered, the damages for delay will be the interest on the value of the goods for the period between these times.—*Smith v. Whitman*, 13 Mo. 352.

**Sup. 1873.** Where freight was received for shipment by a railroad company, the measure of damages for delaying will be the difference in price of the goods when they ought to have been delivered and when they were actually received at their destination.—*Faulkner v. South Pac. R. R.*, 51 Mo. 311.

**Sup. 1874.** The measure of damages for a common carrier's delay in delivering goods is the consignee's necessary expenses incurred in obtaining them, plus the difference between their cost and what could have been realized for them at the time and place of destination, if the amount is less than cost. If greater, nothing is to be added or deducted.—*Rankin v. Pacific R. R.*, 55 Mo. 167.

**App. 1892.** Certain piping was delivered to a railroad company for shipment to plaintiffs. There was nothing about the piping to show that it was not intended merely for resale in the course of trade. As a matter of fact it was necessary to connect the boiler to the engine in plaintiff's flourmill; but the railroad company had no notice of this fact. The delivery of the piping was delayed through the negligence of defendant, causing the flourmill to remain idle for a considerable period. *Held*, that damages, consisting of the rental value of the mill machinery for the time it was idle, the wages of skilled laborers employed by plaintiff and also rendered idle, and the loss of the profits which might have been made, had the mill been in operation, could not have been within the contemplation of the parties, and were not proper elements of damage, in an action against the railroad company, for the delay in delivering

the goods.—*Rogan v. Wabash Ry. Co.*, 51 Mo. App. 665.

**App. 1896.** The skipper of a commodity to the market for sale, who fails to get it to the market through the negligence of the carrier, is entitled to base his claim for damages on the market price, regardless of actual value.—*Johnson-Brinkman Commission Co. v. Wabash R. Co.*, 64 Mo. App. 590.

Where a shipper whose commodity fails to reach the market at a proper time through the negligence of the carrier is entitled to recover the market price, nevertheless, where plaintiff shipped corn so that it would, if delivered promptly, have reached Chicago on a day when for a few hours, because of a corner in the corn market, corn was worth twice as much as it was the day before or the day after, this artificially advanced price could not be considered the market price.—*Id.*

**App. 1899.** In the absence of any special agreement the measure of damages in a case where a shipper sustains damage because of the carrier's failure to deliver the goods shipped in time is the difference in the market value of the goods at the time and place when they should have been delivered and the market price at such place when they were in fact delivered.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

**App. 1906.** The measure of damages for a carrier's negligent delay in transporting property is the difference between the market value of the property at the point of destination, in the condition in which it would have been received had it been delivered in a reasonable time, and its market value at that point in the condition which it was in at the time of its arrival, notwithstanding the stipulation in the bill of lading that in the event of loss of property the value of the same at the point of shipment should govern the stipulation referring to property lost in transit and not to property damaged.—*Hardin v. Missouri Pac. Ry. Co.*, 96 S.W. 681, 120 Mo. App. 203.

**App. 1909.** Measure of damages for negligent delay in the transportation of perishable freight is the difference between the market value of the freight when delivered and when it should have been delivered had no delay occurred, provided the petition therefor warrants it, and does not specifically plead elements of damage, when the recovery is restricted to the elements alleged.—*Parsons v. Louisville & N. R. Co.*, 118 S.W. 101, 136 Mo. App. 494.

**App. 1910.** Ordinarily the measure of damages for delay to a shipment is the difference in the market value of the commodity shipped at destination at the time shipment should have reached destination, and at the time it actually did reach such point.—*Cowherd v. St. Louis & S. F. R. Co.*, 131 S.W. 755, 151 Mo. App. 1.

105(2). **Special damage dependent on knowledge of circumstances.**

**App. 1910.** A carrier is, through its station agent and bill clerk, under the agency of whom it receives freight for transportation, charged with notice rendering it liable for special damages for delay in transportation; the shipper having before delivery of the freight to them explained that the articles, the rolls of his mill, were being shipped for repair, and that till their return he could do no business, and marked on the bill of lading "Rush through."—*Morrow v. Missouri Pac. Ry. Co.*, 123 S.W. 1034, 140 Mo. App. 200.

Expenses for help of a mill, necessarily under pay and idle while the mill is shut down owing to delay in transportation of freight, which the carrier knew must arrive before the mill could start, are recoverable as damages.—*Id.*

**App. 1910.** Where a carrier accepting a shipment of berries for transportation did not know that the shipper had sold them at a certain price, or that he would lose the sale, if the berries failed to arrive at a certain point at the time agreed upon, the carrier upon delay in shipment, resulting in loss of the sale, would not be liable in damages for the difference between the figure at which the berries had been contracted for and the amount for which the shipper subsequently disposed of them; the price obtained being the best possible under the circumstances.—*Cowherd v. St. Louis & S. F. R. Co.*, 131 S.W. 755, 151 Mo. App. 1.

**App. 1912.** The carrier not having been informed of the shipper's intention to transport the goods for the purpose of a sale thereof at a certain time which he had advertised, is not liable, because of its delay in transportation, for the consequential damages of loss of profits from such sale, even were they not too remote, and speculative.—*Dunne & Grace v. St. Louis & S. W. Ry. Co.*, 148 S.W. 997, 166 Mo. App. 372.

105(3). **Excessive damages.**

**App. 1925.** For delay in transportation of merry-go-round, \$500 held excessive by



amount in excess of \$70 for freight, other expenses, and nominal damages.—*Gray v. Wabash Ry. Co.*, 277 S.W. 64, 220 Mo. App. 773.

106. — Trial.

**App. 1883.** What is a reasonable time for delivery of goods by a carrier is usually a question of fact for the jury.—*Schwab v. Union Line*, 13 Mo. App. 159.

**App. 1909.** Where the petition alleged that good tomatoes were depreciated in value a specified sum per crate by the decline in the market, that a specified number of crates were spoiled, and that plaintiff incurred expense in sorting the same, and the evidence showed a greater damage to a specified number of crates than that pleaded, an instruction directing the jury to assess the damages at the difference between the market value of the tomatoes when delivered and the market value of the same when they would have been delivered had no unreasonable delay occurred was erroneous because it enlarged the cause of action pleaded.—*Parsons v. Louisville & N. R. Co.*, 118 S.W. 101, 136 Mo. App. 494.

**App. 1910.** Where a carrier of corn for delivery to an elevator for drying negligently delayed the transportation, and thereby caused the cars to lose the precedence they would have enjoyed if carried promptly, under a rule providing for the sending of cars to the elevator in the order of their arrival, the question of the liability for the injury to the corn, because of delay in transit, because of the rule, was one of fact, on it being assumed that the rule afforded a valid excuse for failure to deliver promptly.—*W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 128 S.W. 42, 148 Mo. App. 308.

**App. 1913.** Slight evidence of negligence in transporting goods is sufficient to take to the jury the issue whether the unusual delay in transportation was negligent or excusable.—*Unionville Produce Co. v. Chicago, B. & Q. R. Co.*, 153 S.W. 63, 168 Mo. App. 168.

Under conflicting evidence, the question whether delay of a shipment was due to defendant's negligence, or to an unavoidable congestion of traffic, was for the jury.—*Id.*

**App. 1917.** Evidence of failure to transport in a reasonable time, proof of which under Rev. St. 1909, § 3121, as amended by Laws 1913, p. 177, is prima facie proof of negligent delay, *held* sufficient to go to the jury.—*Dawson Bros. v. Chicago, B. & Q. R. Co.*, 194 S.W. 743.

Reasonable time for transportation is a question for the jury under the circumstances of the particular shipment; so that instruction that it is the time consumed under ordinary circumstances is error.—*Id.*

**App. 1921.** In an action for delay in delivering a shipment, it is only necessary that sufficient circumstances be shown to raise a slight inference of negligence on the part of the carrier to make a prima facie case for the jury.—*Bland v. Chicago & A. R. Co.*, 232 S.W. 232.

**App. 1922.** In action by shipper who prepaid the freight for refusal to deliver to consignee without payment of charges, whether 12 days delay after arrival of goods before they were offered to consignee on discovery of a mistake as to the charges was so unreasonable as to render carriers liable to the shipper *held* for the jury.—*Russell Grain Co. v. Chicago Great Western R. Co.*, 237 S.W. 159, 208 Mo. App. 485.

In action by shipper who had prepaid the freight against railroads for refusal to deliver goods to shipper's buyer without payment of freight charges, in which railroads claimed the latter refused the goods because of inferior quality, and not because of railroads' demand for payment of charges and consequent delay until railroads' discovery of the mistake, it was error to refuse an instruction submitting such issue.—*Id.*

**App. 1924.** Whether a carrier, at the time of a shipment of a road contractor's equipment, had notice from bill of lading and statements made by contractor of resulting special damages which would result from delay in shipment, *held* for jury.—*McCarten v. St. Louis-San Francisco R. Co.*, 264 S.W. 50.

**App. 1925.** Station agent's authority to contract for shipment from another station by through train *held* for jury.—*Gray v. Wabash Ry. Co.*, 277 S.W. 64, 220 Mo. App. 773.

(F) LOSS OF OR INJURY TO GOODS.

Baggage of passengers, see post, 397-403.  
Carriage of live stock, see post, 214-217½.  
Goods accepted under unauthorized contract of carrier's agent, see ante, 47.

Liability of connecting carriers, see post, 177.

Limitation of liability, see post, 147-168, 180.

### 107. Care required of carrier in general.

**Sup. 1869.** A carrier of goods must not only exercise diligence, but he must use that degree of attention and care which the occasion and subject committed to his trust demand.—*Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

**App. 1906.** Where defendant road was justified in refusing to accept plaintiff's shipment of freight contained in cars placed on defendant's truck, it was under no obligation to push such cars at plaintiff's request to a platform to be unloaded, and hence was not liable for a loss of the shipment by reason of a flood inundating the tracks, though by complying with such request the loss might have been avoided.—*Gray v. Wabash R. Co.*, 95 S. W. 983, 119 Mo. App. 144.

**App. 1910.** A private carrier with or without a reward is only a bailee, and his liability is determined by the rules governing the responsibility of bailees.—*Collier v. Langan & Taylor Storage & Moving Co.*, 127 S.W. 435, 147 Mo. App. 700.

### 108. Nature of liability as common carrier.

When a common carrier receives goods for shipment, it insures their delivery in accordance with bill of lading, unless the loss is occasioned by act of God, or of a public enemy, or by reason of inherent defect or vice of goods or animals, or on account of fault of consignee.

—**Sup. 1886.** *Davis v. Wabash, St. L. & P. R. Co.*, 1 S.W. 327, 89 Mo. 340;

**App. 1908.** *Merritt Creamery Co. v. Atchison, T. & S. F. R. Co.*, 107 S.W. 462, 128 Mo. App. 420; (1912) *Henry Bromschwig Tailors' Trimming Co. v. Missouri, K. & T. Ry. Co.*, 147 S.W. 175, 165 Mo. App. 350; *Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273; (1916) *Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S.W. 149, 193 Mo. App. 572; (1920) *Singer v. American Express Co.*, 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S. Ct. 8, 254 U. S. 632, 65 L. Ed. 448; (1920) *Vernon v. American Ry. Express Co.*, 222 S.W. 913.

**Sup. 1830.** The rule that a carrier is responsible for all losses except such as are inevitable or arise from the act of God or the public enemy applies to carriers by water.—*Daggett v. Shaw*, 3 Mo. 264, 25 Am. Dec. 439.

**Sup. 1833.** A common carrier is liable for all losses of or injury to goods received

for carriage, not occasioned by an act of God or public enemies.—*Daggett v. Shaw*, 3 Mo. 264, 25 Am. Dec. 439.

**Sup. 1869.** In the absence of a special contract limiting its liability, a railroad company is an insurer against every loss or damage except that occasioned by the act of God or the public enemy.—*Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

**Sup. 1927.** Transfer company, whether acting as common carrier or merely as a carrier, is liable as insurer against all damages, except those arising from act of God, etc.—(App. 1924) *Ford v. Wabash Ry. Co.*, 266 S.W. 1032, judgment affirmed 300 S.W. 769.

**App. 1876.** In an action against a carrier for the conversion of goods shipped to plaintiff, an instruction that the goods must have been lost while in the defendant's possession, in order to warrant a recovery, was properly refused.—*Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

**App. 1883.** If a shipper forwards his goods when the temperature is so low that the carrier cannot by the exercise of reasonable care and by the use of reasonable means protect them from freezing, the loss falls on the shipper; but, if the carrier can by the exercise of care protect the goods from freezing, but they freeze, the loss must fall on him.—*Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254.

**App. 1890.** By the principles of the common law a common carrier is liable for the loss of goods intrusted to him for carriage, except where the loss occurs through the act of God or the public enemy. He is consequently liable at common law for the loss of the goods while in his hands from an accidental fire.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

**App. 1906.** The common-law liabilities imposed on common carriers, are applicable to interstate shipments.—*Ficklin v. Wabash R. Co.*, 93 S.W. 847, 117 Mo. App. 221.

**App.** A common carrier of goods is an insurer.—(1908) *Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88, 134 Mo. App. 282; (1924) *Viviano v. Davis*, 258 S.W. 69; (1927) *Frawley v. Atchison, T. & S. F. R. Co.*, 299 S. W. 93, 220 Mo. App. 1189.

**App. 1910.** One holding himself out as engaged in the general business of moving household goods from one residence to another in a city, for all who choose to employ him, is an insurer against all losses save

those due to the act of God, or the public enemy, and a fire destroying goods in his possession is an accident against which he insures, unless the fire is the result of lightning.—*Collier v. Langan & Taylor Storage & Moving Co.*, 127 S.W. 435, 147 Mo. App. 700.

A common carrier may limit his employment to the mere carriage of particular kinds of property, and when this is so, and the fact is known, he is not liable as a common carrier for any other property intrusted to his agents without his consent.—*Id.*

**App. 1912.** An owner of goods lost in transit by a carrier may recover for breach of the carrier's duty as an insurer without proof of negligence.—*Henry Bromschwig Tailors' Trimming Co. v. Missouri, K. & T. Ry. Co.*, 147 S.W. 175, 165 Mo. App. 350.

**App. 1918.** Common carrier is liable for all loss or injury not due to act of God or public enemy, inherent nature or qualities of goods, or act or fault of owner or shipper, although as to those excepted cases carrier may be liable by reason of negligence.—*Robinson v. Bush*, 200 S.W. 757, 199 Mo. App. 184.

**App. 1920.** Carrier is not liable for loss through freezing of perishable freight, unless he was negligent.—*Clemons Produce Co. v. Denver & R. G. R. R.*, 219 S.W. 660, 203 Mo. App. 100.

**App. 1920.** Carmack Amendment to Interstate Commerce Act making an interstate carrier liable for "any loss, injury or damages caused by it or a succeeding carrier to whom the property may be delivered," refers to liability arising from some default in its common-law duty as a common carrier, and does not make the carrier an absolute insurer against every loss, though due to uncontrollable forces.—*Singer v. American Express Co.*, 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S. Ct. 8.

**App. 1921.** The Carmack Amendment did not create an absolute liability on the part of carriers for every loss, damage, or injury from any and every cause.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1926.** A carrier is an insurer of perishable goods, except as to damages caused solely from act of God, public enemy, or inherent infirmity in goods.—*Hurley v. Illinois Cent. R. Co.*, 282 S.W. 97, 221 Mo. App. 478. **CONTRA.** see (1927) *Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 297 S.W. 440, 220 Mo. App. 1316.

### 109. What law governs.

**App. 1915.** Where the negligence of a carrier occurred in Missouri, the law of Missouri governs the rights of the parties.—*Coy v. St. Louis & S. F. R. Co.*, 172 S.W. 446, 186 Mo. App. 408.

**App. 1920.** The liability of a carrier of interstate shipments is governed by the acts of Congress and the common law as accepted and applied in the federal tribunals.—*Singer v. American Express Co.*, 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S. Ct. 8.

**App. 1924.** Substantive rights and liabilities of parties to interstate shipments are determined by acts of Congress and federal court rules of decision, but question whether plaintiff may sue is one of practice and procedure determined by state law.—*American Fruit Growers v. St. Louis, B. & M. Ry. Co.*, 261 S.W. 949, certiorari denied St. Louis, B. & M. R. Co. v. *American Fruit Growers*, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

### 110. Character and value of goods.

**App. 1876.** In an action against a carrier for the conversion of cigars shipped to plaintiff, the fact that the cigars had been classified by the shippers as merchandise in order to escape double rates did not affect plaintiff's right to maintain the action.—*Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

**App. 1920.** A carrier is not an insurer of perishable freight, if the damage is caused by its perishing, but is an insurer in all other respects, just as if it were not perishable, as where it is injured in a wreck or fire, or from any other cause not the act of God or the public enemy.—*Singer v. American Express Co.*, 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S. Ct. 8.

**App. 1924.** Where a carrier agrees to transport goods in a refrigerator car, it impliedly undertakes to exercise such care as that class of goods requires, though such care required is greater than in transportation of ordinary commodities.—*Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 445.

While, generally, carrier as to most commodities delivered to it for transportation is an insurer against all results incident to transportation, except injuries from act of God, public enemy, and fault of shipper, it is only liable for deterioration in perishable goods in case of negligence.—*Id.*

A failure by carrier to ice a car for protection and preservation of fruit to be shipped is a breach of duty and an act of negligence.—*Id.*

☞111. **Condition of goods.**

*See explanation, page iii.*

☞112. **Nature and validity of contract for transportation.**

*See explanation, page iii.*

☞113. **Commencement of liability.**

Carriage of live stock, *see post*, ☞205.

**App. 1911.** The liability of a common carrier attaches as soon as the delivery of goods for transportation is complete, so as to place on the carrier the exclusive duty of seeing after their safety.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

**App. 1914.** Carrier held liable to shipper for loss of goods by fire after delivery and acceptance for transportation and before any bill of lading had been issued, which liability was not affected by the Carmack Amendment to the Hepburn Act, requiring a carrier to issue a bill of lading.—*Morrison Grain Co. v. Missouri Pac. Ry. Co.*, 170 S.W. 404, 182 Mo. App. 339.

**App. 1924.** Generally, point of time marking commencement of carrier's liability is that moment when shipper surrenders entire custody of his goods and carrier receives complete control of them for purpose of shipment at earliest practicable opportunity in usual course of business.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

Generally, although a shipper has agreed to load his property in cars, and has not yet done so, carrier is liable for its loss if it has been placed in his freight house for purpose of shipment with consent of his freight agent, and is ready for immediate transportation, and cause of delay is carrier's failure to furnish requested cars.—*Id.*

☞114. **Termination of liability.**

**App. 1878.** Where goods transported by a railroad arrived at their destination after dark, and remained in the car that night, and on the next day were delivered to warehousemen, no reasonable opportunity was given the consignee to remove the goods, and hence the railroad company was liable on their destruction in the warehouse.—*Bell v. St. Louis & I. M. R. Co.*, 6 Mo. App. 363.

**App. 1905.** Where plaintiff delivered a valise to a carrier for delivery to the station

agent at a railroad station, and the carrier deposited the valise on the station platform, and left it there, he was liable in an action for its loss, although the station agent knew that the carrier always left baggage on the platform.—*Alexander v. McNally*, 87 S.W. 1, 112 Mo. App. 563.

**App. 1907.** Where freight does not arrive at its destination on time, for this reason, as well as because the bill of lading provides for notice, notice of its being ready for delivery is necessary to relieve the carrier of liability for its destruction by fire, though there has been a reasonable time for its removal after it was ready therefor.—*Scott County Milling Co. v. St. Louis, I. M. & S. R. Co.*, 104 S.W. 924, 127 Mo. App. 80.

Where a car was not set out for removal of the freight till 6 o'clock in the evening of a winter day, and it was destroyed by fire eight hours later, it cannot be said the consignee had had reasonable time for removal of the property, so as to relieve the carrier of liability for its destruction.—*Id.*

**App. 1908.** Even though a consignee had a right to inspect cars of freight placed on its switch before accepting them, a delivery on the switch subject to the right of inspection released the carrier from liability as a common carrier, unless the consignee on inspection rejected the freight, and notified the carrier thereof.—*Kingman St. Louis Implement Co. v. Southern Ry. Co.*, 112 S.W. 721, 133 Mo. App. 317.

Where, after delivery of cars of freight to a consignee, the carrier agreed to take them to higher ground to protect them from flood without any charge for switching or otherwise, except the actual expense of handling the cars to keep them out of the water, the carrier took the cars as a bailee, and not as a carrier.—*Id.*

**App. 1909.** A carrier is not liable for damage to oats by fermentation while the cars are at the point of destination, awaiting delivery to the consignee who has received proper notice of their arrival.—*Hardin v. Chicago & A. Ry. Co.*, 114 S.W. 1117, 134 Mo. App. 681.

**App. 1909.** The liability of a carrier of a car load of freight continues until the discharge of the freight.—*Yount v. Wabash R. Co.*, 119 S.W. 1, 136 Mo. App. 697.

**App. 1916.** A railroad, whose relation to goods at the time of their destruction by fire

is that of carrier is liable as an insurer to safely carry and deliver.—*Dancinger Bros. v. Chicago, R. I. & P. Ry. Co.*, 182 S.W. 120.

Under bill of lading providing for notice to the consignee of arrival and for a return in ten days if not accepted, *held*, that where there was an unusual delay in the shipment and no notice to the consignee, the railroad, on their destruction by fire on the ninth day after arrival, was liable to the consignor as carrier.—*Id.*

115. Acts or omissions constituting negligence by carrier in general.

**Sup. 1876.** A railroad company cannot be held liable for the loss of fruit trees, which were frozen while in a car, instead of being unloaded and deposited in the warehouse, if the car was a more suitable place to protect them from the cold.—*Vail v. Pacific R. R.*, 63 Mo. 230.

**Sup. 1927.** Where transfer company had no need for trucks in its business, it was not negligent in not providing trucks on which trunks awaiting delivery might have been placed, when its platform was flooded by unprecedented rainstorm.—(*App. 1924*) *Ford v. Wabash Ry. Co.*, 266 S.W. 1032, judgment affirmed 300 S.W. 769.

**App. 1882.** Care of goods in refrigerator car. See *Wetzell v. Chicago & A. R. Co.*, 12 Mo. App. 599, memorandum.

**App. 1899.** Where a rule of a carrier provides that during cold weather, when perishable property is liable to damage by frost, a pass may be given to a person who may be in charge of and accompany the shipment, when a stove is used for the protection of such property from freezing, and plaintiff, a shipper of certain apples, in November asked leave to place a man in charge of the car with a stove to protect his apples from freezing, and defendant's superintendent refused the request, and the apples were damaged by freezing, the carrier was liable for the resulting injuries.—*Popham v. Barnard*, 77 Mo. App. 619.

**App. 1906.** A carrier is liable for loss of freight from a flood, if it was aware of its approach in time to remove the goods to a place of safety by the exercise of ordinary care and diligence.—*Pinkerton v. Missouri Pac. Ry. Co.*, 93 S.W. 849, 117 Mo. App. 288.

**App. 1906.** Plaintiff was directed by a carrier's agent, in accordance with the custom

at the station where plaintiff's apples were shipped, to place the apples on defendant's right of way preparatory to loading them into cars. While the apples were so placed, defendant's employes began to unload coal near the apples, and though plaintiff warned them to desist until the apples could be gotten out of the way, they refused, and the apples were injured by coal dust which sifted through the cracks in the barrels. *Held*, that such facts established negligence on the part of the carrier, justifying a recovery for the damage sustained.—*Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25.

**App. 1915.** A carrier *held* not liable as for the conversion of goods deposited in a warehouse at a flag station.—*Morrison Tent & Awning Co. v. Illinois Cent. R. Co.*, 175 S.W. 220, 190 Mo. App. 67.

**App. 1923.** A railway company having nothing to do with loading an automobile on a freight car and preparing it for shipment, except to inspect and approve the manner of its being fastened, *held* not liable for the loss thereof by fire by reason of the negligence of a warehouse company's servants in draining gasoline therefrom in proximity to a lighted lantern, though it did not require such drainage, a bill of lading had been signed, and one of its employees got a can for and expected to receive some of the gasoline.—*Train v. Atchison, T. & S. F. Ry. Co.*, 253 S.W. 497, 214 Mo. App. 354.

116. Deviation or delay.

Questions for jury, see post, 136.

**App. 1903.** To authorize a shipper to abandon goods and look to the carrier for their value, or compensation for loss on account of deterioration, it must show not only that it was on account of the carrier's negligence that the goods were not delivered in due time, but also that the carrier negligently kept the goods in an unsafe place until they had materially deteriorated.—*Herr & Friedrichs Chemical Co. v. Lackawanna Line*, 73 S.W. 346, 100 Mo. App. 164.

**App. 1916.** Where perishable goods could have been brought to destination in time for their marketing by transferring the shipment at an intermediate point to another train, failure to make such transfer is negligence rendering the carrier liable for the spoiling of the goods owing to the delay in shipment.—*Whittom v. Adams Express Co.*, 182 S.W. 137.

**App. 1923.** Carriers of goods in interstate commerce are liable for loss and damages proximately caused by failure to transport goods with reasonable dispatch.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

**App. 1925.** Mere delay of shipment by carrier does not establish negligence.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

#### ☞117. Mode or means of transportation.

**App. 1883.** Where goods imported from a foreign country were tendered to a carrier, who had given bond to the United States for the transportation of unappraised dutiable goods in bond, the carrier could not, without the knowledge or consent of the person making the tender, receive them in a different character, and having received the goods as a carrier of bonded goods, and being notified by the bill of lading that the goods were to be transported in bond, it was bound to transport them in bond, if it transported at all, and taking them out of bond and shipping them on an unbonded vessel was a conversion.—*Mellier v. St. Louis & N. O. Transp. Co.*, 14 Mo. App. 281.

**App. 1910.** Common carriers must furnish suitable vehicles for transporting freight, and are liable for losses caused by their failure to do so, though they are entitled to determine, in the first instance, the sufficiency of the vehicles furnished.—*Nicholson v. St. Louis & S. F. R. Co.*, 124 S.W. 573, 141 Mo. App. 199.

**App. 1917.** A common carrier must furnish safe vehicles for transporting goods received for that purpose.—*McDaniel Milling Co. v. Missouri Pac. R. Co.*, 191 S.W. 1021.

A common carrier is liable for furnishing defective cars, unless the shipper himself selects the car, knowing the defect and danger, and there are other cars free from defects reasonably available.—*Id.*

**App. 1923.** It is the duty of carrier to furnish a safe means for the transportation of a commodity received by it for shipment, and its failure to do so makes it liable in damages for loss resulting therefrom.—*Schreiber Milling & Grain Co. v. Chicago Great Western R. Co.*, 246 S.W. 647.

#### ☞118. Negligence of agents or servants.

**Sup. 1892.** Where a railway company, in a bill of lading for the shipment of cotton,

reserves the right to have it compressed, and afterwards places it in the hands of a compress company for that purpose, such compress company becomes the agent of the railway company; and, if the cotton is damaged or destroyed by the negligence of the compress company, the railway company is liable to the owner.—*Otis Co. v. Missouri Pac. Ry. Co.*, 20 S.W. 676, 112 Mo. 622.

**App. 1920.** A railroad is the agent of an express company when carrying goods for it, and the express company must respond for the negligence of the railroad in transporting a shipment.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

**App. 1923.** If the servants of both a railway company and a warehouse company, acting within the scope of their authority, entered a freight car for the purpose of preparing automobiles for shipment by draining gasoline therefrom, and undertook to do so with a lighted lantern, negligently brought by them into the car, in close proximity, both companies would be liable for the resulting loss of the automobiles by fire, whether or not the warehouse company had partially or entirely relinquished them to the custody of the railway company; each being liable for the negligence of its own servants.—*Train v. Atchison, T. & S. F. Ry. Co.*, 253 S.W. 497, 214 Mo. App. 354.

**App. 1925.** Express company's agent in addressing package is not agent of shipper.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

#### ☞119. Act of God, vis major, or inevitable accident.

Liability of carrier as insurer, see ante, ☞108.

**Sup. 1867.** A severe snowstorm, which obstructed the defendant's railroad, and blocked up the trains, held such an act of God as would excuse nonperformance of the defendant's duty as common carrier.—*Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

**App. 1876.** A carrier is liable for loss arising from severe cold, which could not have been prevented nor foreseen, where the loss would have been prevented if it had promptly shipped the goods.—*Armentrout v. St. Louis, K. C. & N. Ry. Co.*, 1 Mo. App. 153.

**App. 1905.** A carrier is not liable, on the theory of breach of contract, for the destruction, by an unforeseen and unanticipated flood, of goods which it delayed to trans-

port, as such consequence was not in the contemplation of the parties as a probable result of the breach.—*Moffatt Commission Co. v. Union Pac. R. Co.*, 88 S.W. 117, 113 Mo. App. 544.

**App. 1907.** Where the flood which injured a shipment of eggs appeared so suddenly and with such magnitude and force that in a few hours it covered the wide valley of the river with water over 10 feet deep, and the warning was so brief very little property was removed to places of safety, that officers of the carrier knew from newspaper reports that the watershed of that river and another into which it emptied was receiving extraordinary rainfall, that both rivers were greatly swollen, and that their waters were expected to continue to rise, was insufficient to establish negligence on the part of the carrier in that in the exercise of care it should have anticipated such flood.—*Lightfoot v. St. Louis & S. F. R. Co.*, 104 S. W. 482, 126 Mo. App. 532.

**App. 1909.** The flood on May 30 and 31, 1903, at the junction of the Kaw and Missouri rivers, at Kansas City, Mo., was an act of God, and a carrier was not liable for loss of freight in such flood.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 122 S.W. 322, 139 Mo. App. 149.

Though defendant railroad was negligent in not getting the car containing plaintiff's butter out of its freight yards before the destructive part of an unprecedented flood, constituting an act of God, came, it was not liable, unless it was warned of the approach, not merely of a rise in the river, but of the flood.—*Id.*

**App. 1910.** The waters of rivers had been gradually rising for several days until the night of May 30th, threatening to inundate railroad tracks on which goods were standing and the weather office and newspapers had sent out warnings of danger. Similar overflows had occurred before without damaging property, and warning had been given by the weather office. On May 31st an unforeseen, unprecedented and overwhelming flood occurred. The flood was unexpected even by the government weather officials, and the goods which had not been removed from the yards were destroyed. *Held*, that the loss was due to the flood, and not to the railroad's failure to remove the goods to a place of safety.—*Wertheimer, Swartz Shoe Co. v. Missouri Pac. Ry. Co.*, 126 S.W. 793, 147 Mo. App. 489.

**App. 1916.** While federal legislation upon liability of carriers in interstate commerce

supersedes state regulations and policies, it did not destroy but was intended to continue in force any right which shipper had under common law, not inconsistent with federal, and the common-law rule, making carrier liable for any loss or damage not the act of God or the public enemy, was not affected.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1920.** Extraordinary hot weather is an act of God, and a carrier is not liable for injury to freight caused thereby.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

#### 120. Inherent defects in goods.

**App. 1912.** A carrier *held* not liable for such damages as result solely from an inherent infirmity in the goods in its care.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

**App. 1920.** If goods are lost or damaged on account of their inherent perishable nature without fault of the carrier, there is no liability; but a carrier is liable where it negligently delays in delivering a shipment and permits the inherent tendency to have its natural effect.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

#### 121. Contributory negligence of owner.

**App. 1878.** In determining what is a reasonable time to be allowed a consignee for the removal of the goods after they have been carried to their destination by the carrier, the question of the absence or nonresidence of the consignee cannot be considered; the reasonable opportunity to remove the goods being measured, not by his peculiar circumstances, but by such as would give to a person residing in the vicinity, and who had informed himself of the probable time of arrival of the goods, and of the course of business of the carrier, a reasonable time during business hours within which he could inspect and remove the goods.—*Bell v. St. Louis & I. M. R. Co.*, 6 Mo. App. 363.

**App. 1909.** While a shipper must bear the loss resulting solely from a misdirection of goods, the carrier is liable when guilty of negligence, without which, notwithstanding the shipper's mistake, the loss would not have occurred; and, where shipping instructions are not clear, it is the carrier's duty, unless an emergency arises, to hold them and ask further instructions from the shipper.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500, 135 Mo. App. 210.

**App. 1910.** While ordinarily a common carrier which receives goods for shipment is required to deliver them according to agreement, yet, when the owner accompanies them, the general liability is limited to the extent that the carrier is in no sense liable for any injury or loss that may occur through the act of the owner or through any agency that is under his exclusive control.—*Nunnelee v. St. Louis, I. M. & S. Ry. Co.*, 129 S.W. 762, 145 Mo. App. 17.

**App. 1916.** The mere knowledge of a shipper of strawberries of defects in refrigerator car, and the probable effect of shipping in such car, would not necessitate a verdict for carrier in an action for damages.—*Scneker v. Lusk*, 190 S.W. 96.

In action for damages to shipment of strawberries from defective refrigerator car, carrier could not avoid liability on account of shipper's knowledge of defects in car, without showing that another car could have been procured which would have materially avoided loss.—*Id.*

A shipper is bound to protest against shipping in a defective car.—*Id.*

**App. 1920.** Where tariffs, made part of bill of lading, stipulated that, if stove was to be used in car, the fuel and attendant should be furnished by shipper, shipper of potatoes, who made no provision for heating car, assumed the risk of injury to shipment from extremely cold weather.—*Clemons Produce Co. v. Denver & R. G. R. R.*, 219 S.W. 660, 203 Mo. App. 100.

**App. 1923.** When a shipper is afforded an opportunity to select the vehicle in which his goods shall be transported, and makes such selection with knowledge of the defects of the vehicle, the carrier is not liable for injury resulting therefrom.—*Schreiber Milling & Grain Co. v. Chicago Great Western R. Co.*, 246 S.W. 647.

**App. 1926.** A carrier is not an insurer against damages to goods caused by carelessness of shipper.—*Hurley v. Illinois Cent. R. Co.*, 282 S.W. 97, 221 Mo. App. 478.

#### ←122. Duties after disaster.

**Sup. 1821.** If merchandise on board a boat gets wet by accident, and no exertion is made to dry it, the carrier is liable for the damage, though his engagement was to deliver safely, "the dangers of the river excepted."—*Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470.

**Sup. 1848.** The master of a steamboat carrying wheat, which was wet by inevitable accident, is not liable for damages because he did not dry the wheat.—*The Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135.

**App. 1907.** Where, a shipment of eggs having been caught in transit by a flood, it was agreed between one of the owners and the carrier that the owner should take charge of the eggs and handle them, for the account of the carrier, such agreement did not affect the rights of the parties by serving to create a liability on the part of the carrier for the loss suffered.—*Lightfoot v. St. Louis & S. F. R. Co.*, 104 S.W. 482, 126 Mo. App. 532.

#### ←123. Proximate cause of loss or injury.

The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause.

—**Sup. 1869.** *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406;

**App. 1883.** *Davis v. Wabash, St. L. & P. Ry. Co.*, 13 Mo. App. 449.

**Sup. 1859.** If a carrier has been delinquent in any of his duties, and a loss has occurred while his wrongful act was in force, he is permitted to show, in defense, although prima facie liable, that, although he may have been in default, yet the loss was independent of that default, and must have happened although the delinquency had never existed.—*Hill v. Sturgeon*, 28 Mo. 323.

**Sup. 1864.** In an action against a common carrier for a loss, it is not sufficient to entitle the plaintiff to recover that there was a defect about the vessel, or want of skill in the carrier; but it must also appear that such defect or want of skill contributed, or may have contributed, in some manner, to occasion the loss.—*Hill v. Sturgeon*, 35 Mo. 212, 86 Am. Dec. 149.

**Sup. 1866.** A railroad company received goods for transportation, which were placed on cars, and, having gone a part of the distance, the cars containing the goods were detached from the train, and other cars taken up in their place, which train arrived safely at its destination. The cars left behind were taken on the train of the following day, and while on the way the train was captured and burnt by the public enemy. *Held*, that the railroad company was not liable.—*Clark v. Pacific R. R.*, 39 Mo. 184, 90 Am. Dec. 458; *Gilkerson v. Same*, *Id.* 354.



**Sup. 1869.** In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared that the cold weather was not the sole cause of injury, and that the loss would not have taken place had not the negligence and inattention of the defendant co-operated with the cold, plaintiff is entitled to recover.—*Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

**Sup. 1876.** In an action against a railroad for the loss of fruit trees, frozen while enroute, the plaintiff must show, in order to recover, that the freezing was caused by unnecessary delay in transporting the trees, or by the negligent or careless exposure of them to the cold.—*Vail v. Pacific R. R.*, 63 Mo. 230.

**App. 1904.** If negligence on the part of a carrier co-operates with an act of God in bringing about the loss of a shipment, the carrier is liable.—*Grier v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S.W. 158, 108 Mo. App. 565.

**App. 1905.** While a carrier is responsible for an injury caused by the concurrence of its negligence with an act of God, yet such injury must be a natural and probable consequence of the negligence, and not an unusual and unanticipated consequence, such as an injury to goods caused by an unprecedented and unforeseen flood, to which the carrier's negligent delay in moving the goods subjected them.—*Moffatt Commission Co. v. Union Pac. R. Co.*, 88 S.W. 117, 113 Mo. App. 544.

**App. 1906.** Delay of a carrier in transporting goods, whereby they come in the path of a flood, and are destroyed by the act of God, is not a proximate cause of their injury.—*Elam v. St. Louis & S. F. R. Co.*, 93 S.W. 851, 117 Mo. App. 453.

**App. 1907.** Where the negligence of a carrier operates as a contributive element proximate to injury to goods, even though such injury is to some extent caused by the act of God, the carrier is liable as though its negligence was the entire cause of the loss.—*Gratiot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

**App. 1907.** Where the flood which injured a shipment of eggs appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight, it was the proximate cause of such injury, and negligent delay, if any, of the carrier in transporting the eggs,

whereby they were exposed to the flood, was but the remote cause.—*Lightfoot v. St. Louis & S. F. R. Co.*, 104 S.W. 482, 126 Mo. App. 532.

**App. 1909.** A carrier is liable for loss of goods where, though improperly directed they would have reached their intended destination but for the changing of the directions by the carrier's agent.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500, 135 Mo. App. 210.

**App. 1910.** Where, in an action against a carrier of corn for delivery to an elevator for drying, the evidence showed that the corn would not have spoiled if it had been turned into the elevator on arrival, the carrier could not relieve itself from liability on the ground that the corn spoiled in consequence of a change of climate.—*W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 128 S.W. 42, 148 Mo. App. 308.

**App. 1920.** Extraordinary hot weather, as an act of God, does not relieve a carrier from liability for damage to a shipment of dressed poultry, if the carrier's negligence contributed to the loss.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

**App. 1926.** Where inherent infirmity of corn damaged in transit combined with negligence of carrier to cause damage and deterioration of corn, carrier is liable.—*Hurley v. Illinois Cent. R. Co.*, 282 S.W. 97, 221 Mo. App. 478.

#### 124. Extent of liability.

*See explanation, page iii.*

#### 124½. Deduction of unpaid charges.

**App. 1910.** A shipper, whose peaches were injured in transit, was liable in an action against the carrier for damages for at least the freight charges on so much of the car load as he received, though not liable for charges on the damaged part of the peaches.—*Dean v. Toledo, St. L. & W. R. Co.*, 128 S.W. 10, 148 Mo. App. 428.

#### 125. Effect of insurance.

*See explanation, page iii.*

#### 125½. Claims for damages.

*See explanation, page iii.*

#### 126. Actions for loss or injury.

Against connecting carriers, see post, 181½, 185.  
Title to maintain action, see ante, 76.

⚡127. — **Nature and form.**

By consignor, see ante, ⚡76.

**App. 1908.** A shipper whose goods are lost during transit may sue in tort for a breach of the common-law duty of the carrier to deliver, which originates at the place of delivery, or he may sue for breach of the contract of transportation, or he may treat the carrier as a bailee and allege the specific tortious act by which the goods were lost, and found his right to recover thereon which originates at the place where the tortious act occurred.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 107 S.W. 462, 128 Mo. App. 420.

The rule that, where a carrier sued for the loss of goods during transit sustains the burden of showing that the loss was the result of an act of God, the burden of proving that the carrier was guilty of negligence contributing to the loss is on the shipper, goes only to a matter of defense, and does not operate to change either the nature or the situs of the cause of action; and, where the defensive matter is met by proof of concurring negligence, the cause rests on the failure of the carrier to deliver the goods at their destination.—*Id.*

A petition in an action against a carrier for the value of goods lost in transit alleged a delivery of the goods to the carrier in Kansas, and its acceptance thereof and undertaking to transport the same to a designated town in Massachusetts, and that it neglected to perform its duty of safely transporting and delivering the same at the designated town, resulting in damages to the shipper. It was stipulated that, if the carrier failed to perform any duty, it only occurred in Kansas. It carried the goods from Kansas into Missouri and back again into Kansas, where they were lost. *Held*, that the stipulation did not change the cause of action from one for breach of the common-law duty to deliver to one in tort for negligence.—*Id.*

**App. 1908.** Generally damages for delay in shipment or loss of property while in a carrier's custody may be recovered either in an action *ex contractu* or one *ex delicto* at the option of the pleader.—*Wernick v. St. Louis & S. F. R. Co.*, 109 S.W. 1027, 131 Mo. App. 37.

**App. 1909.** A shipper, whose goods are damaged while being transported by a carrier, has the choice of declaring either in assumpsit on the contract or in tort for breach of duty imposed by law to carry safely.—

*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

⚡128. — **Rights of action.**

*See explanation, page iii.*

⚡129. — **Defenses.**

**Sup. 1876.** After an injury results to property intrusted to a carrier for transportation, who, upon receiving it for that purpose, declined to fix the price or charge for the transportation, he cannot be allowed to come in and defeat a recovery by saying that at the time of its reception he had a secret intention, unexpressed to the shipper and not agreed to by him, not to charge anything, and that the transportation was gratuitous, and not for hire.—*Gray v. Missouri River Packet Co.*, 64 Mo. 47.

**App. 1876.** Where cigars shipped to plaintiff were classified as merchandise by the shipper in order to escape payment of double rates, and the carrier converted the cigars, plaintiff might recover, though he had not tendered double rates to the carrier.—*Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

**App. 1916.** Where defendant furnished an improper car for shipment of apples, the shipper's direction to connecting carrier to transport the car to its destination *held* not a waiver of damages.—*Smith v. Wabash R. Co.*, 182 S.W. 764.

⚡130. — **Jurisdiction and venue.**

*See explanation, page iii.*

⚡130½. — **Parties.**

*See explanation, page iii.*

⚡131. — **Pleading.**

**Sup. 1873.** In an action against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness, after stating the value in detail of a number of articles, was asked if she knew the value of the chest and contents, and answered in the affirmative, stating the value. She also stated that, besides the articles she had specially mentioned, there were some others which she had not named. Such statement was not made in answer to any question, but in connection with her testimony relating to the contents of the chest. *Held*, that an objection to her testimony on the ground that there was evidence tending to show that there were more goods in the chest than was sued for was not well taken.—*Seyfarth v. St. Louis & I. M. R. Co.*, 52 Mo. 449.

**Sup. 1894.** In an action against a common carrier for the loss of freight stored in its warehouse, evidence that defendant owned the building in which the fire started that destroyed defendant's warehouse, and had leased it to a lard company, whose use of it made it dangerous to the warehouse, was inadmissible where defendant's negligence in that respect was not pleaded.—*E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 28 S.W. 704, 122 Mo. 258.

**Sup. 1894.** A complaint alleged that plaintiffs caused to be delivered to defendant certain property in good condition to be carried by defendant over its road to E., and thence to be forwarded to plaintiffs at L., and that defendant received the goods for said carriage and delivery, but failed to deliver them to plaintiffs in good order. *Held*, that the words "to be forwarded" import an obligation to assume responsibility for the transportation of the goods from E. to L., and for their delivery to plaintiffs.—*Davis v. Jacksonville Southeastern Line*, 28 S.W. 935, 123 Mo. 69.

**App. 1885.** A petition against a carrier for injury to goods, which sets out the fact from which the carrier's legal obligation arises, the obligation, the breach, and the damages resulting therefrom, states a cause of action in tort for the breach of the carrier's common-law obligation as such.—*Hell v. St. Louis, I. M. & S. Ry. Co.*, 16 Mo. App. 363.

**App. 1888.** In an action against a carrier for damages to goods in transit, contributory negligence of the shipper is a defense to be specially pleaded.—*Kain v. Kansas City, St. J. & C. B. R. Co.*, 29 Mo. App. 53.

In an action against a railroad for damages to goods in transit, an allegation of a contract to carry, together with an averment that defendant was a railroad, was sufficient, after verdict, as to the capacity in which defendant received the goods, where the proofs showed that defendant was exercising the office of a common carrier, and did in fact contract and act as a carrier, in the instance in question.—*Id.*

**App. 1889.** In an action against a carrier for failure to deliver goods shipped to plaintiff, defendant must have pleaded it, in order to rely on the defense that plaintiff was not present to receive the goods when they arrived, and that after a reasonable time defendant had placed the car in a safe place in charge of its servants, and that by reason of such facts defendant held the goods as a

warehouseman.—*Pindell v. St. Louis & H. Ry. Co.*, 34 Mo. App. 675.

**App. 1889.** Where a shipper brings an action against a carrier for its failure to discharge the duties of a carrier imposed by the common law, the shipper is only required to allege and prove a delivery of the goods to the carrier, failure to deliver to the owner or consignee, and the value of the goods; and, if a special contract has been entered into between the carrier and the shipper, the contract in a proper case may become admissible to limit the liability of the carrier to such an extent as the law permits.—*Nickey v. St. Louis, I. M. & S. Ry. Co.*, 35 Mo. App. 79.

**App. 1895.** Where an original statement before a justice averred that plaintiff delivered a trunk to defendant, which for a consideration it undertook to transport to another place and there deliver it to plaintiff, which it failed to do, an amendment, made after the trunk had been found and delivered, setting up damages for delay to the contents and value of use of the goods and expenses, did not set up a new cause of action, since the case could have been tried on the original statement; the finding of the trunk and its delivery being only considered in mitigation of damages.—*Lawrence v. Atchison, T. & S. F. Ry. Co.*, 61 Mo. App. 62.

**App. 1903.** Where a petition alleges that the defendant express company received a package addressed to plaintiff, and by its negligence the goods were lost, proof that, through negligent failure to deliver, the package was retained by the company until destroyed by a fire, which was not negligently caused, constitutes a variance.—*Farr v. Adams Exp. Co.*, 75 S.W. 183, 100 Mo. App. 574.

**App. 1905.** Where a complaint for injury done to furniture in transit alleged that defendant's servants negligently and wantonly broke the seal on the car, and, in order to make room for other freight, threw plaintiff's furniture about the car, and threw other freight against the furniture, there could be no recovery, in the absence of evidence of the specific acts of misconduct alleged against defendant's servants, notwithstanding evidence authorizing an inference of the infliction of the injury by defendant.—*Galm v. Wabash R. Co.*, 87 S.W. 1015, 113 Mo. App. 591.

**App. 1906.** Where, in an action against a carrier for negligence in the transportation of fruit, plaintiff specifically alleged that the negligence consisted in transporting the fruit in a refrigerator car with the ventilators

closed, plaintiff was bound to prove the negligence alleged, and was not entitled to rely on the presumption of negligence arising from proof that the fruit was sound when delivered to the carrier and damaged when it reached its destination.—*Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25.

**App. 1908.** The failure of a carrier to deliver property received for transportation constitutes, in the absence of proof that the loss was occasioned by an act of God or the public enemy, or resulted from inevitable accident or from inherent defects in the property, a cause of action; and the shipper need not allege or prove the specific misconduct that incapacitated the carrier from delivering the goods.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 107 S.W. 462, 128 Mo. App. 420.

**App. 1910.** In an action against a railroad for injury to peaches in transit, defendant, if it wished to avail itself of the defense that the contract of shipment only required the icing of the car at a certain point, should have invoked the provision of the contract by which plaintiff was claimed to have directed the icing of the car, and have alleged obedience to his directions.—*Dean v. Toledo, St. L. & W. R. Co.*, 128 S.W. 10, 148 Mo. App. 428.

**App. 1912.** A shipper declaring on the negligence of a carrier *held* required to prove the charge as laid.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

**App. 1913.** Where plaintiff pleaded specific acts of negligence, he could not rely on evidence that the corn was in good condition when shipped and was not so when received, as establishing a *prima facie* case.—*Yontz v. Missouri Pac. Ry. Co.*, 160 S.W. 832, 174 Mo. App. 482.

**App. 1914.** In an action for injury done to the remains of plaintiff's mother, an allegation of injury resulting from rough handling by the agents of a carrier in possession of the remains was proper, and improperly stricken.—*Wall v. St. Louis & S. F. R. Co.*, 168 S.W. 257, 184 Mo. App. 127.

**App. 1914.** The complaint, in an action for damages to a shipment of turkeys, *held*, in view of Rev. St. 1909, § 1794, not to warrant recovery for those lost in transit.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

In an action for damages for loss on a shipment of turkeys, evidence of an item of loss not pleaded is improperly received.—*Id.*

**App. 1915.** In an action against a carrier, where specific negligence in the carriage of goods is pleaded, recovery must be had on that ground, or not at all.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

**App. 1916.** Under Carmack Amendment, requiring that contract for shipment in interstate commerce be in writing, but not stating that if contract is not in writing it shall be void, plaintiff is not compelled to plead written contract of shipment.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1916.** At common law, in action against a carrier for loss or damages to goods shipped the shipper need not allege or prove the carrier's negligence.—*Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 187 S.W. 149, 193 Mo. App. 572.

**App. 1917.** Plaintiff, having chosen to found action on issuance of bill of lading instead of verbal contract for shipment, *held* bound to prove bill as condition to recovery.—*Cudahy Packing Co. v. Chicago & N. W. Ry. Co.*, 196 S.W. 406, 196 Mo. App. 528.

**App. 1918.** In an action against a common carrier for damage to a shipment of meat, a defense that the meat was spoiled, because being packed in defective refrigerator cars, was not covered by general denial.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 201 S.W. 623, 198 Mo. App. 520.

**App. 1924.** Under petition charging that contracts of shipment were entered into between plaintiff and defendant railroad, plaintiff could recover damages on proof that contracts were made in name under which it transacted its business in certain territory.—*American Fruit Growers v. St. Louis, B. & M. Ry. Co.*, 261 S.W. 949, certiorari denied *St. Louis, B. & M. R. Co. v. American Fruit Growers*, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

**App. 1925.** Petition *held* to have been bottomed on theory that reconsigned wheat was delivered to defendant under new contract and as initial carrier.—*Forest Green Farmers' Elevator Co. v. Davis*, 270 S.W. 394, 216 Mo. App. 545.

#### ⇨ 132. — Presumptions and burden of proof.

**Sup. 1859.** Common carriers are insurers of goods intrusted to them for carriage, and the burden is on them to show that they fully performed their contract, or that the goods were lost by one of the excepted perils.—*Hill v. Sturgeon*, 28 Mo. 323.

**Sup. 1869.** After the damage to goods has been established, the burden of proof lies upon the carrier to show that they were occasioned by an act or peril which the law recognizes as exempting him from liability.—*Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

**Sup. 1874.** In an action against a carrier for delivering a barrel of cider with the head burst, leaving only a small quantity of cider in the barrel, where the only defense relied on was that the cider had fermented, the burden of proving the defense is on the carrier.—*Green v. Indianapolis & St. L. R. Co.*, 56 Mo. 556.

**Sup. 1886.** In an action against a carrier for loss of goods delivered to it for carriage, the question whether the burden is cast on the carrier to show that the loss was occasioned by the act of God or the public enemy depends on the nature of the case made by plaintiff.—*Davis v. Wabash, St. L. & P. Ry. Co.*, 1 S.W. 327, 89 Mo. 340.

The burden of proof, in an action for injury sustained by goods in the hands of a carrier, that the damage was occasioned by a cause which exempts him from liability, is upon the carrier; and his showing thereof casts the burden on the owner to show that the damage might have been avoided by the exercise of reasonable skill and attention.—*Id.*

**Sup. 1927.** On plaintiff's showing of delivery of goods to carrier in good condition and subsequent damage, burden is on carrier to show by clear, positive, and unequivocal evidence that damage was caused by act of God, whereupon burden shifts to plaintiff to show defendant's negligence causing or contributing to damage.—(App. 1924) *Ford v. Wabash Ry. Co.*, 266 S.W. 1032, judgment affirmed 300 S.W. 760.

**Sup. 1927.** In action against transfer company for injury to baggage, burden held on company to prove injury was caused by act of God.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (App. 1924) 266 S.W. 1032.

**App. 1876.** The loss of goods delivered to an express company for transportation raises a presumption that the loss was due to the negligence of the carrier.—*Kirby v. Adams Express Co.*, 2 Mo. App. 369.

**App. 1879.** Presumption of negligence from injury to goods in carriage. See *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585, memorandum.

Right of owner of goods to recover damages from carrier, though not the shipper.—*Id.*

**App. 1883.** Where, in an action against a carrier for damage to goods by a flood, the evidence for plaintiff shows damage, and at the same time vis major sufficient in itself to account for the damage, there is no presumption that the negligence of the carrier, rather than the act of God, was the efficient cause of the damage.—*Davis v. Wabash, St. L. & P. Ry. Co.*, 13 Mo. App. 449.

In an action against a carrier, plaintiff makes out his case by proving delivery and loss. If it further appears that the loss was occasioned by an unexpected cause, such as the act of God, then, if nothing further appears, the carrier is not liable; but, if it appears that the danger might have been avoided by the exercise of skill and caution, then defendant must show that he exercised such skill and caution.—*Id.*

**App. 1885.** Where, after the delivery of goods by the carrier at their destination, they were not examined for six weeks, during which time they were in the exclusive control and custody of the owner and her agent, it could not be presumed that the injury to them discovered upon examination was inflicted by the carrier; but the burden was on the owner to show affirmatively that they were not injured after the transit ceased, and prior to their examination.—*Nave v. Pacific Express Co.*, 19 Mo. App. 563.

**App. 1886.** In an action against a carrier of goods which are shown to have been delivered to the carrier free from injury, and delivered by it to the consignee injured, the burden is on the carrier to account for the injury.—*Buddy v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 206.

**App. 1895.** In an action against an express company for injuries to property while in defendant's hands as carrier, it appeared that the property, which was a framed picture, was left by defendant's delivery agent just inside the entrance of a public building occupied by the consignee, and was not inspected by the consignee for two or three days after it was there delivered, and when so inspected the glass was found to be broken and the picture scratched, as if broken pieces of the glass had shifted back and forth across it. *Held*, that while, if the picture had been inspected by the consignee immediately upon receipt, and had then been found in a damaged condition, the presumption that the dam-

age occurred while the package was in defendant's possession would have attached, such presumption did not arise, in view of the fact that the inspection was not made until some time after the receipt of the package, and hence it was incumbent on plaintiff to show that the damage occurred during the transit, and not after the delivery.—*Degge v. American Express Co.*, 64 Mo. App. 102.

**App. 1905.** In an action against a carrier for loss of goods before delivery, the burden is on defendant to account for the loss.—*Alexander v. McNally*, 87 S.W. 1, 112 Mo. App. 563.

**App. 1906.** While a shipper makes out a prima facie case by proof of delivery of goods to a carrier in good condition, and the carrier's failure to deliver them in like condition, the carrier meets this by showing their destruction by the act of God, and then the shipper must show any concurrent negligence of the carrier.—*Elam v. St. Louis & S. F. R. Co.*, 93 S.W. 851, 117 Mo. App. 453.

**App. 1906.** Where, in an action against a carrier for damages to apples in transit, plaintiff proved that when the apples were delivered to the carrier they were sound, and that when they arrived at destination they were found to be damaged by "heating and scalding," and that the ventilators of the car were closed, such proof established a prima facie case of defendant's negligence, without further proof that the ventilators of the car were closed by defendant's employes, and not by some third person.—*Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25.

**App. 1907.** A presumption of negligence arises which is sufficient to justify a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition and their arrival at the point of destination in a damaged condition.—*Nairn v. Missouri, K. & T. Ry. Co.*, 106 S.W. 102, 126 Mo. App. 707.

**App. 1908.** In an action against a carrier for failure to protect freight in cars from injury by flood, plaintiff must show that the goods were in defendant's possession either as a carrier or warehouseman.—*Kingman St. Louis Implement Co. v. Southern Ry. Co.*, 112 S.W. 721, 133 Mo. App. 317.

**App. 1909.** That oats were in good condition when shipped was no proof that they were in the same condition on arrival at destination.—*Hardin v. Chicago & A. Ry. Co.*, 114 S.W. 1117, 134 Mo. App. 681.

**App. 1909.** The burden is on a carrier deviating from shipping directions to show that such deviation did not contribute to the loss of the goods.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500, 135 Mo. App. 210.

**App. 1912.** Where a cause of action against a carrier for damage to or loss of freight is founded on negligence of the carrier, the burden of proving negligence is on plaintiff.—*Bockserman v. St. Louis & H. Ry. Co.*, 152 S.W. 389, 169 Mo. App. 168.

**App. 1912.** A shipper declaring on the negligence of a carrier *held* required to prove the charge as laid.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839. See Carriers, 131 in this Digest.

**App. 1914.** In a suit against a carrier of goods based on a specified act of negligence, the burden is on plaintiff throughout to show that his damages resulted solely from the alleged cause.—*Smith v. Gulf, C. & S. F. Ry. Co.*, 164 S.W. 132, 177 Mo. App. 269.

Where a car leaves in good order and becomes defective on its journey, it devolves on the consignee to show that the carrier knew, or should have known, of the defect, and failed to exercise proper care to discover or remedy it, and that a negligent breach of such duty was the proximate cause of his loss.—*Id.*

**App. 1916.** At common law, the burden is on the carrier to show that a loss or damage to goods shipped comes within one of the recognized exceptions to liability.—*Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 187 S.W. 149, 193 Mo. App. 572.

In action against carrier for damage to shipment, the plaintiff has the initial burden of showing that he delivered the goods to the carrier in good condition properly prepared for shipment.—*Id.*

**App. 1917.** That sewer pipe, which is not broken by ordinarily careful handling, was properly packed and upon arrival one-third of the pipe was broken, *held* evidence of negligence.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S.W. 1032, 196 Mo. App. 139.

**App. 1917.** In action for loss of olive oil in transit, allegation of petition that "defendant wrongfully drew out the oil" did not throw upon plaintiff the burden of showing that the carrier itself drew out the oil, the petition counting on the carrier's common-law liability as an insurer.—*Zerilli v. Ross*, 198 S.W. 487.

**App. 1920.** Carrier is not liable for loss through freezing of perishable freight, unless he was negligent; but burden is upon carrier to show itself not negligent.—*Clemons Produce Co. v. Denver & R. G. R. R.*, 219 S.W. 660, 203 Mo. App. 100.

**App. 1920.** Showing by shipper of receipt by carrier of goods in good condition, and delivery in bad condition, is a prima facie showing that carrier has failed in his common-law duty to bring shipment safely through at all hazards, save the act of God, the public enemy, or the inherent nature of the freight, and, to escape liability, carrier must show that shipment falls within exception.—*Singer v. American Express Co.*, 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S. Ct. 8.

**App. 1920.** Where shipper by express showed arrival of dressed poultry in consignee's city in the early morning of a very hot day, and failure of defendant express company to deliver to consignee until six hours later, the burden then shifted to the defendant to account for the unreasonable delay in making delivery; the facts relating thereto being peculiarly and exclusively within its knowledge.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913.

**App. 1920.** Burden is on consignee, in an action for damages to a shipment by freezing, etc., to prove delivery of the shipment to the carrier in good condition.—*Peycke Bros. Commission Co. v. Lehigh Valley R. Co.*, 224 S.W. 71.

**App. 1923.** In an action against a carrier for loss or damage due to carrier's failure to transport shipment with reasonable dispatch, plaintiff makes out a prima facie case by proof of the carrier's failure to transport and deliver the goods within a reasonable time, making it incumbent on the defendant to explain or excuse such failure by evidence tending to show that same was due to causes consistent with due care on its part and for which the carrier is not responsible.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

**App. 1923.** In action for fuel oil lost in transit, founded on common-law liability of the carrier as an insurer, where the evidence tended to prove that the tank car of oil was delivered in good condition, and on arrival at destination it was found that the oil was lost, the burden was on the carrier to show that the loss actually resulted through a cause for which it was exempt, such as the act of the

shipper.—*Missouri Cobalt Co. v. Missouri Pac. R. Co.*, 255 S.W. 970.

**App. 1924.** A carrier is an insurer, and, when the fact of loss or damage to a shipment is shown, a presumption of negligence and liability arises against the carrier; it not being necessary for the shipper to point out the particular act of negligence causing the injury.—*Viviano v. Davis*, 258 S.W. 69.

**App. 1925.** Unexplained delay presumed negligent.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

**App. 1926.** On showing of prima facie case in action on bill of lading, carrier must overcome same by proof of nondelivery.—*First Nat. Bank v. Missouri Pac. Ry. Co.*, 278 S.W. 1075, 220 Mo. App. 941.

**App. 1926.** Shippers, whose corn was damaged during shipment, are prima facie entitled to recover all damages sustained on showing negligence of carrier, and carrier has burden of proving negligence by which shippers enhanced damages, and extent of enhancement of such damages.—*Hurley v. Illinois Cent. R. Co.*, 282 S.W. 97, 221 Mo. App. 478.

Shippers, suing under insurer doctrine for damage to corn, make out prima facie case by proving delivery to carrier in good condition and receipt in bad condition, thus casting burden on carrier to show loss was caused in manner exonerating it from liability.—*Id.*

**App. 1928.** Ordinarily, when shipper has shown delivery of goods in good condition and arrival in damaged condition, carrier must account for damaged condition.—*Wentworth Fruit Growers' Ass'n v. American Ry. Express Co.*, 1 S.W.(2d) 1028.

Shipper pleading specific negligence cannot invoke presumption arising from damaged condition of goods on arrival.—*Id.*

**App. 1928.** One suing carrier for loss of goods on presumption loss occurred in transit must show loss did not occur after transit ceased and before examination.—*Niedt v. American Ry. Express Co.*, 6 S.W.(2d) 973.

### 133. — Admissibility of evidence.

**Sup. 1888.** In an action to recover the value of three boxes of goods shipped at St. Louis on board of one of the defendant's boats, to be delivered at Leavenworth, it appeared that the boxes were included in the bill of lading, but not included in the receipt

given at the place of destination. *Held*, that evidence of a waybill on a railroad, and a manifest of a steamboat running over a portion of the line over which the goods had to pass, was inadmissible to explain the discrepancy between the bill of lading and the receipt.—*Erb v. Keokuk Packet Co.*, 43 Mo. 53.

**App. 1885.** Where a contract for a shipment of goods provided that, in the event of loss or damage to the goods, the amount of such loss or damage should be computed at the value or cost of the goods at the place and time of the shipment, it was not error to refuse to permit a witness for defendant to testify as to the value of the goods at the place of their destination.—*Caples v. Louisville, E. & St. L. Ry. Co.*, 17 Mo. App. 14.

**App. 1904.** In an action by a shipper against a carrier to recover for the loss of a shipment destroyed by a flood when the goods were in a car in defendant's yard, and the removal of the car to a place of safety was difficult, if not impossible, evidence that another carrier moved cars of freight out of such yard before the inundation was improperly received, in the absence of any showing that the carrier which removed its cars had no better facilities for removing them than defendant.—*Grier v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S.W. 158, 108 Mo. App. 565.

**App. 1907.** Where goods were lost because of the connecting carrier's misdelivery to a person without authority to receive them, evidence of the value of the goods at the place of shipment was admissible to establish their value at destination.—*Marshall Medicine Co. v. Chicago & A. R. Co.*, 104 S.W. 478, 126 Mo. App. 455.

**App. 1916.** In action for damages to meat shipped defendant carrier, to prove the meat spoiled from inherent defects or improper preparation, may introduce direct evidence or circumstantial evidence tending to eliminate every other cause.—*Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 187 S.W. 149, 193 Mo. App. 572.

Where meat shipped was delivered to the carrier sealed in plaintiff's refrigerator car, evidence by defendant, that the capacity of ice bumpers in plaintiff's refrigerator cars is not sufficiently large to keep the meat cool enough to preserve it from decay, is admissible.—*Id.*

**App. 1918.** In action for damages to two cars of onions, evidence was admissible

that while the two carloads had been taken up in first place by one of the terminal railroad associations of the city of shipment, such association was in fact acting for defendant railroad, and that that was the usual practice between the plaintiff and defendant and the association.—*Jones v. Toledo, St. L. & W. R. Co.*, 202 S.W. 433.

#### —134. — Sufficiency of evidence.

**Sup. 1875.** In an action against a common carrier for damages to a cargo of goods, proof by the plaintiff that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the carrier sufficiently establishes the negligence of the defendant.—*Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199.

**Sup. 1890.** Where plaintiff's evidence was that a fountain was properly packed and delivered to the carrier in good order, and that when it reached its destination one side of the crate was broken, and one of the inside stays broken, and the others out of place, there is no error in refusing an instruction in the nature of a demurrer to the evidence.—*Witting v. St. Louis & S. F. Ry. Co.*, 14 S.W. 743, 101 Mo. 631, 10 L. R. A. 602, 20 Am. St. Rep. 636.

**Sup. 1892.** In an action by the owner of cotton against a common carrier to recover damages for its loss by fire, the evidence showed that the carrier, after receiving it, placed it in the hands of a third party, to be compressed; that the compress was a large shed, open on the east, where a platform 45 feet wide reached a railroad track on which were several cars loaded with cotton, from one of which a servant of the compress company removed a bail in which the fire originated about five minutes afterwards; that the officers and employes of the compress company indulged in smoking under and around the shed; that one employe had been seen carrying matches behind his ear; that on the day of the fire an officer of the company was seen under the shed walking over some cotton with a lighted cigar in his hand. *Held*, that the evidence was sufficient to support a finding that the fire arose from the negligence of the compress company.—*Otis Co. v. Missouri Pac. Ry. Co.*, 20 S.W. 676, 112 Mo. 622.

**Sup. 1927.** Evidence that damage to plaintiff's baggage was due to unprecedented rainfall and flood *held* to require direction of verdict for defendant.—(*App. 1924*) *Ford v.*



Wabash Ry. Co., 266 S.W. 1032, judgment affirmed 300 S.W. 769.

Evidence *held* insufficient to show transfer company's failure to notify plaintiff of wetting of baggage by unprecedented flood, caused any damages, or that failure to pile trunks on top of one another in first instance was negligence.—*Id.*

Evidence *held* insufficient to show negligence of transfer company in failing to watch weather, which contributed to damage to baggage from unprecedented flood.—*Id.*

**Sup. 1927.** Evidence that baggage became water-soaked while in carrier's possession *held* to make prima facie case.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (*App.* 1924) 266 S.W. 1032.

**App. 1895.** In an action against a railroad company for the value of oranges, sold by it on refusal of the consignee to take them, the evidence examined, and *held* to preponderate in favor of the defendants having used ordinary care in the disposal of the oranges; and hence the action of the trial court in granting a new trial after a verdict in favor of the consignor for a greater amount than that derived from the sale was not an abuse of discretion.—*Hull v. Missouri Pac. Ry. Co.*, 60 Mo. App. 593.

**App. 1904.** In an action against a carrier for loss of a car load of oats by a flood, *held*, that the facts did not show any negligence on the part of defendant contributing to the loss of the oats.—*Grier v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S.W. 158, 108 Mo. App. 565.

**App. 1906.** Evidence in an action by a shipper against a carrier for destruction by a flood of goods shipped, that on the afternoon before the flood struck the yards where the goods were, the water had risen considerably and had reached lower lands, is insufficient to authorize a finding of negligence of the carrier.—*Elam v. St. Louis & S. F. R. Co.*, 93 S.W. 851, 117 Mo. App. 453.

**App. 1906.** In an action against a carrier for alleged loss of goods, evidence *held* sufficient to contradict a receipt given by the consignee's agent for the goods, and to sustain a finding that one case of the shipment was never delivered by the carrier.—*Strawn v. Missouri, K. & T. Ry. Co.*, 96 S.W. 488, 120 Mo. App. 135.

**App. 1908.** In an action against a carrier for damage to goods by flood the evidence

*held* to show that the cars had been delivered to plaintiff in good condition before the flood, so that its liability as carrier had ceased when the goods were damaged.—*Kingman St. Louis Implement Co. v. Southern Ry. Co.*, 112 S.W. 721, 133 Mo. App. 317.

**App. 1909.** In an action against an express company for loss of a money package by burglary after offer to deliver the same at destination had been declined, evidence *held* to sustain a verdict for defendant.—*Bank of Vanduser v. Wells Fargo Co.*, 120 S.W. 678, 139 Mo. App. 77.

**App. 1910.** In an action against a carrier for goods burned in transit, where the only way the fire could have originated was from a lighted lantern under the exclusive control of the shipper who was traveling in the car, the carrier could not be held liable without evidence showing that it did as a matter of fact cause the fire to be started from the lantern.—*Nunnelee v. St. Louis, I. M. & S. Ry. Co.*, 129 S.W. 762, 145 Mo. App. 17.

**App. 1910.** Where a carrier's servant testified that grease got onto plaintiff's monuments after the car arrived at destination, but before the monuments were unloaded, and that it was caused by the witness placing bacon on the monuments while removing other freight from the car, the proof sufficiently showed that the monuments were injured while in the carrier's possession.—*McHanev v. St. Louis & S. F. R. Co.*, 129 S.W. 1065, 149 Mo. App. 369.

**App. 1911.** Evidence *held* to support a finding that a common carrier accepted a car of lumber for transportation and issued its bill of lading therefor.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

**App. 1914.** In an action against a railroad company for injury to goods, evidence *held* to sustain a finding that the goods were damaged while in the possession and under the control of defendant.—*Connolly v. Illinois Cent. R. Co.*, 166 S.W. 1077, 183 Mo. App. 408.

**App. 1914.** Carmack amendment to the Hepburn Act did not change the common law, and hence the liability of a railroad company which received an interstate shipment of fruit in good condition is prima facie shown upon delivery in bad condition.—*Collins v. Denver & R. G. Ry. Co.*, 167 S.W. 1178, 181 Mo. App. 213.

**App. 1914.** In an action for damages to a shipment of turkeys where plaintiff sought reimbursement for expenses in making a trip to look after the shipment, no recovery can be allowed on proof that he made the trip without proof of the amount of the expenditure.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

**App. 1914.** In a shipper's action for the loss of goods burned while standing on a switch before any bill of lading had been issued, evidence *held* sufficient to sustain a finding of delivery to and acceptance by the carrier for transport.—*Morrison Grain Co. v. Missouri Pac. Ry. Co.*, 170 S.W. 404, 182 Mo. App. 339.

**App. 1915.** In an action for injury to a car load of vegetables during transportation, pleading a breach of the carrier's common-law duty safely to carry and deliver it, evidence *held* to show that the vegetables were damaged on arrival.—*Watson v. Union Pac. R. Co.*, 178 S.W. 871.

**App. 1916.** In an action for damages for injuries to a shipment of apples, evidence *held* to show the injuries were caused by defendant's delivery of a beer car, instead of a refrigerator car, and not the shipper's delay in having the car forwarded by the connecting carrier.—*Smith v. Wabash R. Co.*, 182 S.W. 764.

**App. 1916.** Under common law, a prima facie case against a carrier for loss or damages to goods shipped is made by showing a delivery to the carrier in good condition and properly packed, and subsequent delivery after transportation in bad condition.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S.W. 149, 193 Mo. App. 572.

Where meat shipped was delivered to the carrier sealed at plaintiff's plant in plaintiff's own refrigerator car, bill of lading for the car acknowledging receipt in "apparent" good order, contents and condition of contents unknown, and packer's certificate of United States Inspection *held* not to show that the meat was shipped in good order and properly prepared for shipment.—*Id.*

**App. 1918.** In an action against a common carrier for damages to a shipment of fresh meat, evidence that the meat was packed as was customary *held* sufficient to show that it was properly packed and in good condition at the time of delivery to the carrier.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 201 S.W. 623, 198 Mo. App. 520.

In an action against a common carrier for damages to a shipment of meat in transit, evidence *held* not to show notice to the carrier of intent to claim damages, as required by the bill of lading.—*Id.*

**App. 1918.** In action for damages to shipment of onions, testimony of plaintiff's representative at destination point that, though all of the sacks were not examined, an examination of 50 or more sacks satisfied him that the onions in both cars were damaged by freezing, entitled plaintiff to recover some damages.—*Jones v. Toledo, St. L. & W. R. Co.*, 202 S.W. 433.

**App. 1920.** Evidence *held* to sustain finding of carrier's negligent delay in delivering dressed poultry at destination.—*Vernon v. American Ry. Express Co.*, 222 S.W. 913. See Carriers, 104 in this Digest.

**App. 1923.** Evidence that stock feed had been loaded for delivery to plaintiff, into a car plainly marked as having a leaky roof, that it remained on the tracks consigned to plaintiff for several hours, and that plaintiff then tendered it in that car to defendant carrier for transportation, unmistakably indicated to the defendant that plaintiff desired the feed transported in the car in which it was then loaded.—*Schreiber Milling & Grain Co. v. Chicago Great Western R. Co.*, 246 S.W. 647.

**App. 1923.** In an action by a potato shipper against carrier for damages by freezing due to failure of the carrier to transport the shipment with reasonable dispatch, plaintiff's evidence that at a season when extremely cold weather might be expected the defendant carrier consumed seven days in transporting and delivering the shipment at destination, whereas two days was a reasonable time therefor, which evidence was not controverted by defendant, made a prima facie case of liability.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

**App. 1924.** In an action against carrier as such or as warehouseman for loss of portion of shipment returned to plaintiff on consignee's refusal to accept, where plaintiff testified he delivered the goods to defendant in good condition and it was conceded the goods were in defendant's possession from that time until again delivered to plaintiff, but defendant did not attempt to show why all the goods were not returned or what became of the goods missing, plaintiff *held* to have sustained the burden of proof of negligence of defendant.—*Viviano v. Davis*, 258 S.W. 69.

**App. 1924.** In an action for damages for deterioration of a car of strawberries, evidence *held* to show that car was not properly iced when furnished by carrier.—*Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 445.

**App. 1926.** Mere proof of delay insufficient to make *prima facie* case against carrier for delay of shipment of perishable goods.—*Rudy v. Cleveland, C. & St. L. R. Co.*, 278 S.W. 814.

Evidence showing rough handling of cantaloupes *held* not to warrant verdict for loss.—*Id.*

**App. 1926.** Notation on bill of lading, "shipper's load and count," *held* not to overcome *prima facie* case for plaintiff for destruction of shipment.—*First Nat. Bank v. Missouri Pac. Ry. Co.*, 278 S.W. 1075, 220 Mo. App. 941.

**App. 1928.** Evidence *held* to sustain finding that loss occurred during transit while shipment was under railway's exclusive control.—*Niedt v. American Ry. Express Co.*, 6 S.W.(2d) 973.

### 135. — Damages.

**Sup. 1875.** In an action against a common carrier for loss of goods, whether the action be *trover*, *assumpsit*, or *case*, the measure of damages is their value at the time of conversion and at the place of destination.—*Union R. & Transp. Co. v. Traube*, 59 Mo. 355.

**Sup. 1876.** The measure of damages for injury to goods is the value of the goods, with interest from the day they should have been delivered, less the freight, if unpaid.—*Gray v. Missouri River Packet Co.*, 64 Mo. 47.

**Sup. 1927.** In suit against transfer company for damage to baggage while in its possession, interest *held* allowable from date suit was instituted.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (*App. 1924*) 266 S.W. 1032.

**App.** The measure of a carrier's liability for loss or damage to goods in general is the value of the goods at destination.—(1876) *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27; (1907) *Marshall Medicine Co. v. Chicago & A. R. Co.*, 104 S.W. 478, 126 Mo. App. 455.

**App. 1879.** Extent of liability of carrier of goods for damage from negligence. See *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585, memorandum.

**App. 1885.** The measure of damages for injury to goods in transit is the difference between their market value at their destination in their damaged condition, and their market value in their proper condition, with interest upon the balance from that date at the rate of 6 per cent. per annum; and freight which had been paid could not be deducted from the amount of damages so ascertained.—*Heil v. St. Louis, I. M. & S. Ry. Co.*, 16 Mo. App. 363.

**App. 1893.** In the absence of stipulations limiting their liability, carriers who deliver goods injured during transit are responsible for their market value in the condition they were received for shipment at the point of destination, less their market value in the condition in which they were delivered and the freight rates earned for their carriage.—*Gray v. St. Louis, I. M. & S. Ry. Co.*, 54 Mo. App. 666.

Plaintiff stated to defendant railroad company that he desired a special rate for shipment of his steam shovel to a certain point, as he "had got a contract there." *Held*, this statement was insufficient to charge the railroad company with notice of the terms of the contract, and hence, on injury to the shovel, it was not liable for consequential damages resulting from idleness of laborers employed by plaintiff and loss of profits.—*Id.*

Before a carrier can be held liable for special damages accruing from loss or injury to the goods, it must be shown that such special damage was contemplated by the consignor and carrier at the time of the shipment, and that the carrier had notice of the special circumstances leading to such damages when the goods were received for transportation.—*Id.*

**App. 1895.** Where, in an action for loss and injury to goods shipped over defendant's railroad, the court had instructed that plaintiff could not recover if the goods were shipped under the special contract set up in the answer, an instruction authorizing the jury, if they found for plaintiff, to find a verdict according to the market value of said goods at the point of destination at the time said goods should in the usual course of transportation have arrived there was not erroneous; it stating the true measure of damages.—*Hance v. Wabash & W. Ry. Co.*, 62 Mo. App. 60.

**App. 1903.** While a carrier may be liable for a delivery without collecting a draft attached to the bill of lading, and also for

nondelivery to the consignee by reason of loss of property, and the like, yet his liability arises from different sources, and, while the measure of damages in some cases might be the same in both instances, it would frequently not be.—*Fowler v. Chicago, R. I. & P. Ry. Co.*, 71 S.W. 1077, 98 Mo. App. 210.

**App. 1906.** In an action against a carrier for the loss of furniture having no market value in transportation, it was proper to admit evidence as to the value of the furniture at the place of shipment.—*Ross v. Chicago, R. I. & P. R. Co.*, 95 S.W. 977, 119 Mo. App. 290.

**App. 1908.** The measure of damages for the loss of freight by a carrier or its nondelivery at destination, in the absence of notice of a special contract of sale between the shipper and the consignee, or of special facts which would entitle the shipper to extra damages, is the value of the property at destination less the cost of carriage, the value at destination being the market value, if the goods have such a value, and if not their reasonable value as shown by evidence.—*Wilson v. St. Louis & S. F. R. Co.*, 108 S.W. 612, 129 Mo. App. 347.

**App. 1910.** Cost of articles damaged in transportation by reason of a carrier's negligence, at the point of shipment, is not the proper measure of the carrier's liability.—*McIlaney v. St. Louis & S. F. R. Co.*, 129 S.W. 1065, 149 Mo. App. 369.

**App. 1910.** Where contract in bill of lading provided that no carrier should be liable for more than value of goods at time and place of shipment, measure of damages in action for damages to goods was difference in value at the point of shipment.—*Dean v. Toledo, St. L. & W. R. Co.*, 128 S.W. 10. See Carriers, ¶158(1) in this Digest.

**App. 1912.** The body of plaintiff's wife was taken for transportation by a carrier, and plaintiff accompanied it, and at a stopping place the baggageman stood on the box containing the coffin and pulled heavy trunks from the top of the car and let them fall with full force on the box so that they would bound to the floor of the baggage car, the plaintiff at the time pleading with the baggageman to be careful and not to handle the body in such a rough and inhuman manner. *Held*, in plaintiff's action for damages for injury to the body, that he was entitled to recover damages for mental anguish.—*Wilson v. St. Louis & S. F. R. Co.*, 142 S.W. 775, 160 Mo. App. 649.

Where a dead body was delivered by a carrier in bad condition, due to its rough handling while in the baggage car, the plaintiff's compensatory damages were limited to the amount he was compelled to expend to prepare the body for burial.—*Id.*

Where plaintiff, in an action against a carrier for alleged negligent handling of the dead body of his wife in transportation, shows an invasion of his legal rights, he is entitled to recover nominal damages at least.—*Id.*

**App. 1912.** Measure of damages for injuries to freight during transportation defined.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

**App. 1914.** In an action against a carrier for loss of goods, on which freight had not been paid, the consignee's measure of damages is the value of the goods at destination, less the freight.—*Fehrenbach Wine & Liquor Co. v. Atchison, T. & S. F. Ry. Co.*, 167 S.W. 631, 182 Mo. App. 1.

Where, in an action against a carrier for loss of whisky, the only evidence of damage was the value of the whisky at the point of shipment, plaintiff could not recover more than nominal damages.—*Id.*

**App. 1914.** Where a petition against a carrier for injuries to the remains of plaintiff's mother, and the casket and box containing the same, alleged that the injury was inflicted wantonly and willfully by defendant's agent while in anger and in plaintiff's presence, he was entitled to recover for mental anguish occasioned thereby.—*Wall v. St. Louis & S. F. R. Co.*, 108 S.W. 257, 184 Mo. App. 127.

Where the remains of plaintiff's mother were injured and indignity inflicted on them by the agent of a carrier willfully and maliciously, in anger and in plaintiff's presence, plaintiff was entitled to recover punitive damages.—*Id.*

**App. 1914.** Where a shipment of turkeys was spoiled by reason of delay, the measure of damages is the difference between the market value of the turkeys at the destination in the condition they would have been had they been delivered in a reasonable time and their market value as they arrived.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

In an action for damages to a shipment of turkeys, no recovery can be had for an element not pleaded.—*Id.*

**App. 1914.** In a shipper's action for the loss of goods, in which the only allegation of damages was limited to the precise value of the goods, interest on the amount of the recovery could not be allowed.—*Morrison Grain Co. v. Missouri Pac. Ry. Co.*, 170 S.W. 404, 182 Mo. App. 339.

**App. 1916.** Verdict for \$500 punitive damages against carrier for mistreatment of corpse *held* not excessive, or so out of proportion to actual damages of \$5 as to show passion and prejudice.—*Wall v. St. Louis & S. F. R. Co.*, 182 S.W. 1057.

**App. 1916.** In an action for damages for failure to deliver sugar, evidence *held* to show that the carrier knew that it had been resold or was to be resold, and so was liable for consequential damages as loss of profits, on resale.—*Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, 184 S.W. 915.

**App. 1924.** When goods delivered to a carrier for shipment are lost in transit, the carrier is liable for the reasonable market value thereof at the point of destination, less unpaid carrying charges thereto.—*Ward v. American Ry. Express Co.*, 259 S.W. 514.

**App. 1924.** At common law, damages for loss of a shipment are determinable as of the point of destination, though under the Cummins Amendment to the Interstate Commerce Act, a carrier's liability is not limited to the value at destination, but includes full actual loss, damage, or injury.—*Bernet, Craft & Kauffman Milling Co. v. New York, C. & St. L. R. Co.*, 260 S.W. 508.

Where a shipment of flour damaged in transit was shown to have been worth, at the point of destination, \$13.30 per barrel, but to have been previously contracted for at \$8.50 per barrel, and where, after its loss, the consignor manufactured more to replace that lost, *held*, that the carrier's liability for damages was measured by the cost of manufacturing the flour to replace that lost, rather than by either the market value or the contract price, though such liability could not be less in any event than the contract price.—*Id.*

**App. 1924.** Measure of damage to cabbages and onions in transit is difference between reasonable market value on date of arrival at destination had they arrived in

good, sound, merchantable condition, and reasonable market value at same time and place in damaged condition.—*American Fruit Growers v. St. Louis, B. & M. Ry. Co.*, 261 S.W. 949, certiorari denied *St. Louis, B. & M. R. Co. v. American Fruit Growers*, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

**App. 1925.** Measure of damages for loss of wheat in transit stated; "full actual loss, damage or injury."—*Forest Green Farmers' Elevator Co. v. Davis*, 270 S.W. 394, 216 Mo. App. 545.

**App. 1925.** Liability includes full actual loss or injury.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

**App. 1925.** The measure of damages for goods lost in transit, in either interstate or intrastate shipment, is the value thereof at the time when, and place where, they should have been delivered, less freight charges if not already paid.—*Klingenberg v. Davis*, 268 S.W. 99, 219 Mo. App. 1.

**App. 1927.** Measure of damages for berries damaged in transit, refused by consignee and reconsignee to another point, *held* difference between value at original destination in damaged state and value had they arrived in good condition, less net amount received for shipment.—*Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 297 S.W. 440, 220 Mo. App. 1316.

### 136. — Questions for jury.

**Sup. 1927.** Whether baggage transfer company was negligent in not preventing damage to baggage during unprecedented flood *held* for jury.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (*App. 1924*) 266 S.W. 1032.

**App. 1883.** While, as a matter of law, in the absence of special contract, a carrier is not bound to furnish a refrigerator car, in an action against a carrier for damages to goods which froze while in transit, there being evidence to show that if the goods had been in the refrigerator car they would not have frozen, it was a question for the jury whether the carrier acted reasonably in not furnishing such a car.—*Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254.

**App. 1892.** In an action for injuries to goods while in shipment, evidence that they were delivered to the railroad company in sound condition and well and securely packed, and arrived at their destination broken, was sufficient to justify submission to the

jury of the question of defendant's negligence, though defendant offered evidence that the car in which the goods were placed was properly and carefully handled and that no accident happened to it.—*Heck v. Missouri Pac. Ry. Co.*, 51 Mo. App. 532.

**App. 1903.** Even if a carrier of a car load of explosives was liable for its destruction by fire only in case of negligence, yet it is a question for the jury whether it was not negligence to allow it to stand for several days unguarded on a transfer track, half a mile from the business part of a town, exposed to the risk of fires built by tramps, who infested the vicinity, and from sparks of passing locomotives, the nature of its contents being announced by a placard thereon.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 74 S.W. 492, 101 Mo. App. 442.

**App. 1906.** Evidence in an action against a carrier for loss of freight from a flood *held* sufficient to go to the jury on the question of defendant's negligence in not getting the goods to a place of safety, after it knew of the approach of the flood.—*Pinkerton v. Missouri Pac. Ry. Co.*, 93 S.W. 849, 117 Mo. App. 288.

**App. 1907.** In an action against a carrier for loss of a shipment of freight, the issue of defendant's negligence *held* properly submitted to the jury.—*Gratiot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

Where a bill of lading provided that, in case of loss, the damage should be computed at the value of the goods at the time and place of shipment, and in an action against the carrier the evidence was directed entirely to the value of the goods at the place of destination, defendant was not entitled to a peremptory instruction in its favor; plaintiff being entitled to at least nominal damages for the breach of the contract.—*Id.*

**App. 1908.** In an action by a shipper against a railroad company for destruction by flood of goods shipped, there was evidence that other railroads moved freight out of the lowland in the river bottoms in anticipation of a possible inundation of their tracks in areas which were lower than defendant's premises, and which the rising waters had commenced to invade, but that no one thought on the day when these operations were prosecuted that the flood would increase to a volume sufficient to submerge the higher bottom levels on which defendant's premises were situated, under 8 or 10 feet of water, as it

did that night and the following day so rapidly that thousands of people engaged in business in the bottoms were so completely surprised that no property of any consequence was saved, nor was there any intimation in the weather bureau reports of the coming of so extraordinary a flood. *Held*, that the evidence did not present an issue of fact for the jury as to defendant's negligence, but showed that negligence could not be attributed to it for failing to anticipate the coming of the flood.—*Elam v. St. Louis & S. F. R. Co.*, 110 S.W. 601, 131 Mo. App. 115.

**App. 1908.** In an action against a carrier for injuries to goods, whether they were improperly loaded and packed *held* for the jury.—*Connelly v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 310.

**App. 1909.** Changing the route of shipment from that stated in the contract is not negligence per se; but change, without good cause, coupled with unusual delay causing damage to the freight, is evidence of negligence sufficient to raise an issue of fact.—*Parsons v. Louisville & N. R. Co.*, 118 S.W. 101, 136 Mo. App. 494.

**App. 1911.** Whether a carrier by the issuance of a bill of lading accepted a car of lumber for transportation is a question for the jury.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

**App. 1912.** Whether damages to goods were caused by the carrier's negligence *held* for the jury.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

Whether a carrier of perishable freight was guilty of negligent delay in transporting the freight *held* for the jury.—*Id.*

Whether negligent delay of a carrier in transporting freight was the proximate cause of the damage complained of *held* for the jury.—*Id.*

**App. 1914.** In an action for damages to a shipment of turkeys, evidence *held* sufficient to go to the jury.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

**App. 1915.** In an action for damages to a car load of vegetables during transportation, *held*, on the evidence, that whether plaintiff's order to keep the ventilators on the refrigerator car closed was contributory negligence proximately causing the injury,

In an action for damages to a shipment of turkeys, no recovery can be had for an element not pleaded.—*Id.*

**App. 1914.** In a shipper's action for the loss of goods, in which the only allegation of damages was limited to the precise value of the goods, interest on the amount of the recovery could not be allowed.—*Morrison Grain Co. v. Missouri Pac. Ry. Co.*, 170 S.W. 404, 182 Mo. App. 339.

**App. 1916.** Verdict for \$500 punitive damages against carrier for mistreatment of corpse *held* not excessive, or so out of proportion to actual damages of \$5 as to show passion and prejudice.—*Wall v. St. Louis & S. F. R. Co.*, 182 S.W. 1057.

**App. 1916.** In an action for damages for failure to deliver sugar, evidence *held* to show that the carrier knew that it had been resold or was to be resold, and so was liable for consequential damages as loss of profits, on resale.—*Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, 184 S.W. 915.

**App. 1924.** When goods delivered to a carrier for shipment are lost in transit, the carrier is liable for the reasonable market value thereof at the point of destination, less unpaid carrying charges thereto.—*Ward v. American Ry. Express Co.*, 259 S.W. 514.

**App. 1924.** At common law, damages for loss of a shipment are determinable as of the point of destination, though under the Cummins Amendment to the Interstate Commerce Act, a carrier's liability is not limited to the value at destination, but includes full actual loss, damage, or injury.—*Bernet, Craft & Kauffman Milling Co. v. New York, C. & St. L. R. Co.*, 260 S.W. 508.

Where a shipment of flour damaged in transit was shown to have been worth, at the point of destination, \$13.30 per barrel, but to have been previously contracted for at \$8.50 per barrel, and where, after its loss, the consignor manufactured more to replace that lost, *held*, that the carrier's liability for damages was measured by the cost of manufacturing the flour to replace that lost, rather than by either the market value or the contract price, though such liability could not be less in any event than the contract price.—*Id.*

**App. 1924.** Measure of damage to cabbages and onions in transit is difference between reasonable market value on date of arrival at destination had they arrived in

good, sound, merchantable condition, and reasonable market value at same time and place in damaged condition.—*American Fruit Growers v. St. Louis, B. & M. Ry. Co.*, 261 S.W. 949, certiorari denied *St. Louis, B. & M. R. Co. v. American Fruit Growers*, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

**App. 1925.** Measure of damages for loss of wheat in transit stated; "full actual loss, damage or injury."—*Forest Green Farmers' Elevator Co. v. Davis*, 270 S.W. 394, 216 Mo. App. 545.

**App. 1925.** Liability includes full actual loss or injury.—*Wall v. American Ry. Express Co.*, 272 S.W. 76, 220 Mo. App. 989.

**App. 1925.** The measure of damages for goods lost in transit, in either interstate or intrastate shipment, is the value thereof at the time when, and place where, they should have been delivered, less freight charges if not already paid.—*Klingenberg v. Davis*, 268 S.W. 99, 219 Mo. App. 1.

**App. 1927.** Measure of damages for berries damaged in transit, refused by consignee and reconsigned to another point, *held* difference between value at original destination in damaged state and value had they arrived in good condition, less net amount received for shipment.—*Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 297 S.W. 440, 220 Mo. App. 1316.

### 136. — Questions for jury.

**Sup. 1927.** Whether baggage transfer company was negligent in not preventing damage to baggage during unprecedented flood *held* for jury.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (*App. 1924*) 266 S.W. 1032.

**App. 1883.** While, as a matter of law, in the absence of special contract, a carrier is not bound to furnish a refrigerator car, in an action against a carrier for damages to goods which froze while in transit, there being evidence to show that if the goods had been in the refrigerator car they would not have frozen, it was a question for the jury whether the carrier acted reasonably in not furnishing such a car.—*Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254.

**App. 1892.** In an action for injuries to goods while in shipment, evidence that they were delivered to the railroad company in sound condition and well and securely packed, and arrived at their destination broken, was sufficient to justify submission to the

jury of the question of defendant's negligence, though defendant offered evidence that the car in which the goods were placed was properly and carefully handled and that no accident happened to it.—*Heck v. Missouri Pac. Ry. Co.*, 51 Mo. App. 532.

**App. 1903.** Even if a carrier of a car load of explosives was liable for its destruction by fire only in case of negligence, yet it is a question for the jury whether it was not negligence to allow it to stand for several days unguarded on a transfer track, half a mile from the business part of a town, exposed to the risk of fires built by tramps, who infested the vicinity, and from sparks of passing locomotives, the nature of its contents being announced by a placard thereon.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 74 S.W. 492, 101 Mo. App. 442.

**App. 1906.** Evidence in an action against a carrier for loss of freight from a flood *held* sufficient to go to the jury on the question of defendant's negligence in not getting the goods to a place of safety, after it knew of the approach of the flood.—*Pinkerton v. Missouri Pac. Ry. Co.*, 93 S.W. 849, 117 Mo. App. 288.

**App. 1907.** In an action against a carrier for loss of a shipment of freight, the issue of defendant's negligence *held* properly submitted to the jury.—*Gratiot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

Where a bill of lading provided that, in case of loss, the damage should be computed at the value of the goods at the time and place of shipment, and in an action against the carrier the evidence was directed entirely to the value of the goods at the place of destination, defendant was not entitled to a peremptory instruction in its favor; plaintiff being entitled to at least nominal damages for the breach of the contract.—*Id.*

**App. 1908.** In an action by a shipper against a railroad company for destruction by flood of goods shipped, there was evidence that other railroads moved freight out of the lowland in the river bottoms in anticipation of a possible inundation of their tracks in areas which were lower than defendant's premises, and which the rising waters had commenced to invade, but that no one thought on the day when these operations were prosecuted that the flood would increase to a volume sufficient to submerge the higher bottom levels on which defendant's premises were situated, under 8 or 10 feet of water, as it

did that night and the following day so rapidly that thousands of people engaged in business in the bottoms were so completely surprised that no property of any consequence was saved, nor was there any intimation in the weather bureau reports of the coming of so extraordinary a flood. *Held*, that the evidence did not present an issue of fact for the jury as to defendant's negligence, but showed that negligence could not be attributed to it for failing to anticipate the coming of the flood.—*Elam v. St. Louis & S. F. R. Co.*, 110 S.W. 601, 131 Mo. App. 115.

**App. 1908.** In an action against a carrier for injuries to goods, whether they were improperly loaded and packed *held* for the jury.—*Connelly v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 310.

**App. 1909.** Changing the route of shipment from that stated in the contract is not negligence per se; but change, without good cause, coupled with unusual delay causing damage to the freight, is evidence of negligence sufficient to raise an issue of fact.—*Parsons v. Louisville & N. R. Co.*, 118 S.W. 101, 136 Mo. App. 494.

**App. 1911.** Whether a carrier by the issuance of a bill of lading accepted a car of lumber for transportation is a question for the jury.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 135 S.W. 85, 155 Mo. App. 465.

**App. 1912.** Whether damages to goods were caused by the carrier's negligence *held* for the jury.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

Whether a carrier of perishable freight was guilty of negligent delay in transporting the freight *held* for the jury.—*Id.*

Whether negligent delay of a carrier in transporting freight was the proximate cause of the damage complained of *held* for the jury.—*Id.*

**App. 1914.** In an action for damages to a shipment of turkeys, evidence *held* sufficient to go to the jury.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

**App. 1915.** In an action for damages to a car load of vegetables during transportation, *held*, on the evidence, that whether plaintiff's order to keep the ventilators on the refrigerator car closed was contributory negligence proximately causing the injury,



was for the jury.—*Watson v. Union Pac. R. Co.*, 178 S.W. 871.

**App. 1916.** Where meat shipped was delivered to the carrier sealed in plaintiff's refrigerator car, and there is evidence that there was no delay or failure to ice, the question of the cause of the spoiling of the meat is for the jury.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S.W. 149, 193 Mo. App. 572.

**App. 1917.** In action against carrier for loss on shipment, evidence of customary inspection of cars by plaintiff *held* to make issue for jury as to condition of car when delivered to original carrier.—*Equity Elevator Co. v. Union Pac. R. Co.*, 191 S.W. 1067.

**App. 1923.** In an action for damage to a shipment of stock feed, evidence on behalf of defendant that such feed had tendency to heat and spoil if it was not properly cured *held* to raise a question for the jury as to whether the loss resulted from defect in the goods or breach of the carrier's public duty.—*Schreiber Milling & Grain Co. v. Chicago Great Western R. Co.*, 246 S.W. 647.

**App. 1923.** Where plaintiff, in December, 1918, left household goods locked up in a farmhouse, and they were shipped to him in August, 1920, but lost in transit, on issue of plaintiff's knowledge as to the condition of the goods, the presumption obtains that they remained in the same condition, the lapse of time only affecting their value, and what effect it had on them was for jury.—*Taylor v. St. Louis & H. R. Co.*, 256 S.W. 499.

**App. 1923.** In action for fuel oil lost in transit, founded on a common-law liability of the carrier as an insurer, where evidence tended to prove that the tank car was delivered to carrier in good condition, and on arrival a destination the oil was lost, whether such loss resulted from act of shipper *held*, under the evidence, for jury.—*Missouri Cobalt Co. v. Missouri Pac. R. Co.*, 255 S.W. 970.

**App. 1925.** Whether nursery stock was negligently delayed by carrier, thereby subjecting it to frost, *held* for jury.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

**App. 1926.** Proof *held* to make prima facie case for plaintiff which cannot be taken from jury, in action on bill of lading for shipments destroyed.—*First Nat. Bank v. Missouri Pac. Ry. Co.*, 278 S.W. 1075, 220 Mo. App. 941.

Question for jury, where evidence in conflict as to delivery to carrier of shipments destroyed.—*Id.*

Issue as to whether goods were delivered to carrier properly submitted to jury, where controverted.—*Id.*

**App. 1926.** In action for damages to shipment of corn, evidence *held* not to warrant holding as matter of law that there was not sufficient rain to have penetrated cars.—*Hurley v. Illinois Cent. R. Co.*, 282 S.W. 97, 221 Mo. App. 478.

**App. 1927.** Evidence of negligent delay in movement of car of berries *held* insufficient for jury.—*Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 297 S.W. 440, 220 Mo. App. 1316.

Whether car containing strawberries should have been re-iced at shipping point *held* for jury.—*Id.*

### 137. — Instructions.

**Sup. 1866.** Where a plaintiff sets forth in his petition that the defendant, a railroad company, by failing to use ordinary care and diligence in the management of its railroad cars, caused the plaintiff to lose a negro slave who escaped from the company's custody during transportation, but the instructions are predicated on the ground of a contract, and the responsibilities of a bailee or common carrier are applied to the defendant, a judgment for the plaintiff will be set aside, although there was no demurrer to the petition.—*Harris v. Hannibal & St. J. R. Co.*, 37 Mo. 307.

**Sup. 1927.** Failure to instruct that plaintiff has burden of proving carrier's negligence concurred with act of God *held* no error, where carrier's evidence tended to show such negligence.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (App. 1924) 266 S.W. 1032.

**App. 1883.** In an action against a carrier for damages to goods by a flood, it was not error to instruct that defendant must "establish" that the damage resulted from the act of God.—*Davis v. Wabash, St. L. & P. Ry. Co.*, 13 Mo. App. 449.

**App. 1887.** Where, in an action to recover damages for injuries to goods alleged to be due to the carrier's negligence in transporting them, there was evidence of a special contract exempting the carrier from liability for damages caused by certain perils, and

there was no evidence that such property, properly packed, or packed as the property in question was packed, was not liable to be broken by the ordinary dangers incident to railroad transportation, and there was no evidence that the carrier failed to use ordinary care in handling the particular goods, an instruction that if the goods, when taken possession of by the carrier for transportation, were in good order and they were properly packed, and when delivered at their destination were in an injured condition, the law presumed that the injury was occasioned through the negligence of the carrier, was erroneous, because it made the happening of the injury to the goods *prima facie* evidence of the carrier's liability, though the accident itself was exempted by the contract between the parties, throwing the burden of proving negligence on the plaintiff.—*Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

**App. 1888.** In an action against a carrier for injuries to goods in transit, a charge authorizing the jury to assess such damages as were occasioned by the default or negligence of the defendant is not open to the objection of failing to direct the jury to allow for such loss or damage as is usually or necessarily incident to such transportation.—*Kain v. Kansas City, St. J. & C. B. R. Co.*, 29 Mo. App. 53.

In an action against a carrier for injury to goods in transit, it was proper, in charging on the duty of the shipper with reference to the taking of the goods, to qualify the phrase "safe condition" by the word "reasonably."—*Id.*

**App. 1909.** In an action against an express company for loss of a money package by the burglarious breaking of the safe in which the agent placed the money after making an ineffectual attempt to deliver it, an instruction that the jury should not determine the question of defendant's negligence in caring for the money by placing it in the safe of a store by the fact that the money was stolen nor from the fact that it might not have been stolen or lost had defendant placed it elsewhere, but should determine it by what a reasonably prudent man would have done concerning his own affairs under like circumstances, as shown from a consideration of all of the evidence in the cause, was proper.—*Bank of Vanduser v. Wells-Fargo Co.*, 120 S.W. 678, 139 Mo. App. 77.

**App. 1910.** Where answer did not plead contract releasing carrier nor was there any

proof that bill of lading valuing freight was ever called to plaintiff's attention until offered at trial, or that rate charged was other than full tariff rate, the court did not err in refusing to limit plaintiff's recovery to value named in bill of lading.—*McHaney v. St. Louis & S. F. R. Co.*, 129 S.W. 1065. See Carriers, —167 in this Digest.

**App. 1912.** An instruction in an action for damages for alleged willful negligence in handling the dead body of plaintiff's wife, permitting a finding for the plaintiff without defining the elements of damage that the jury might consider, or limiting them to the evidence to determine the amount, was not reversible error.—*Wilson v. St. Louis & S. F. R. Co.*, 142 S.W. 775, 160 Mo. App. 649.

**App. 1914.** In an action for damages to a shipment of turkeys, the jury should be told what the measure of damages is, though it be plain from the petition for what loss plaintiff seeks to recover; hence an instruction which merely limited the total amount plaintiff could recover is improper.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 170 S.W. 324, 183 Mo. App. 180.

**App. 1918.** In action against a common carrier for damages to a shipment of meat, an instruction for defendant, if the damage was caused by the insufficiency of the cars to properly refrigerate the meat, *held* properly refused as being outside the issue.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 201 S.W. 623, 198 Mo. App. 520.

**App. 1923.** An instruction, directing recovery for a shipper for damage to goods during shipment because of the leaky car in which it was shipped, was not erroneous as modified to deny recovery if the jury found the plaintiff knew of the leaky condition of the car, but was favorable to plaintiff for omitting the element of exercise of due care by plaintiff to observe the condition of the car in which the goods were loaded before they were tendered for shipment.—*Schreiber Milling & Grain Co. v. Chicago Great Western R. Co.*, 246 S.W. 647.

**App. 1924.** In action for damage to goods in transit, instruction to allow difference between what they "would have brought in open market" on day of arrival at destination, had they arrived in good condition, and reasonable market value in damaged condition, *held* not misleading nor prejudicial to defendant, if technically erroneous.—*American Fruit Growers v. St. Louis, B. & M. Ry.*

Co., 261 S.W. 949, certiorari denied St. Louis, B. & M. R. Co. v. American Fruit Growers, 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

**App. 1924.** In an action for damages for deterioration in car of strawberries, instruction that carrier was liable, if it failed to furnish car properly equipped for refrigeration, or to properly refrigerate such car, when furnished to shipper, and contents were thereby damaged, was not objectionable as requiring carrier to have car iced to capacity at moment of delivery to shipper.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 264 S.W. 445.

In an action for damages for deterioration in car of strawberries, an instruction barring shipper's recovery, if shipper's negligence contributed in any degree to damage of berries, was properly refused; words "in any degree" being improper.—Id.

**App. 1925.** Instruction which did not hypothesize negligence in loss of wheat as pleaded was erroneous.—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo. App. 545.

Instruction *held* erroneous as failing to limit recovery to amount of wheat claimed to have been lost.—Id.

**App. 1925.** Instructions *held* to set forth constituent elements of negligent delay by carrier.—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo. App. 31.

Instruction in action against carriers for damage to shipment *held* properly refused, as misleading.—Id.

**App. 1928.** Shipper's requested instruction making carrier insurer of shipment of strawberries *held* properly modified to make carrier liable if it failed to transport berries in good condition.—Wentworth Fruit Growers' Ass'n v. American Ry. Express Co., 1 S. W.(2d) 1028.

Refusal of instruction as to burden of proof resting on carrier from presumption arising from delivery in damaged condition, where shipper had pleaded specific negligence, *held* proper.—Id.

#### 137½. — Verdict and findings.

**App. 1926.** If jury, in suit under insurer doctrine for damage to shipment of corn, cannot determine whether damage was due to negligence of carrier or inherent condi-

tion of goods, jury should find for plaintiffs.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo. App. 47.

#### (G) CARRIER AS WAREHOUSEMAN.

As to baggage of passenger, see post, 404, Connecting carriers, see post, 178, 180. Limitation of liability, see post, 157.

#### 138. Change in nature of liability of carrier in general.

See explanation, page iii.

#### 139. Goods awaiting transportation.

See ante, 113, 134.

**App. 1891.** Where goods are taken to a railroad depot for immediate shipment, and deposited in the railroad's storehouse only to await the arrival of a car and the convenience of the railroad's agent, the railroad's liability as a carrier at once attaches, although the goods are destroyed while still in the storehouse.—Gregory v. Wabash Ry. Co., 46 Mo. App. 574.

#### 140. Goods awaiting delivery.

**Sup. 1884.** In order to change the liability of a railroad company from that of common carrier to that of a warehouseman, it is not necessary that the consignee should have notice of the arrival of the goods at their destination.—Gashweiler v. Wabash, St. L. & P. Ry. Co., 83 Mo. 112, 53 Am. Rep. 558.

**Sup. 1919.** When a shipment arrives on time, and the carrier places the goods in warehouse to await delivery, its liability as carrier ceases after a reasonable time for their removal, although no notice is given to the consignee, and its liability thereafter is that of a warehouseman only.—(App. 1915) Danciger v. Atchison, T. & S. F. Ry. Co., 179 S. W. 800, judgment reversed 212 S.W. 5.

**App. 1878.** The liability of a railroad company as common carrier does not terminate with the deposit of the goods at the point of destination in a proper place or with the delivery of them to a warehouseman, but the extraordinary liability so far continues as to enable the consignee to have reasonable time and opportunity after they are ready for delivery to examine and remove the goods.—Bell v. St. Louis & I. M. R. Co., 6 Mo. App. 363.

**App. 1886.** After the arrival of goods at their destination, after they had been discharged from the cars, the liability of the

railroad company as a common carrier ceases, and it becomes a bailee for hire.—*Buddy v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 206.

**App. 1889.** If goods shipped on railroads arrive on time, then the carrier is not bound to notify the consignee of the arrival; but it may, after the expiration of a reasonable time, unload the goods, or if in bulk, or full car lots, it may place the car in a safe place under the charge of its servants, and when this is done the liability of the road ceases to be that of a carrier.—*Pindell v. St. Louis & H. Ry. Co.*, 34 Mo. App. 675.

**App. 1890.** If, after the original contract for the carriage of goods, the shipper directs that the goods be delivered at another place to another, to be carried to the shipper at the original point of destination, and the carrier placed them in its warehouse at the substituted place of delivery until they could be taken by the third person, and while in such warehouse they were destroyed by an accidental fire, without negligence of the carrier, it is not liable for their value, for in such case the transit would have been at an end, and the carrier would be an ordinary bailee for hire.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

**App. 1890.** If, when a car of wheat arrived, the carrier notified the consignee of its arrival, and thereupon placed it in a reasonably safe place to await the action of the consignee in taking possession of it, holding itself ready to inform the consignee, upon application, of the place where it was, the carrier thereafter held it as warehouseman, and was not liable for its accidental destruction by fire without negligence on its part. If, on the other hand, in pursuance of a previous arrangement with the consignee, the carrier had engaged that all car load consignments of wheat for such consignee should, on their arrival, be placed on a certain track, and the car load was placed on that track, and the carrier notified the consignee that it had so arrived and had been so placed, then the carrier was exonerated in respect of its liability as a common carrier, irrespective of whether such track was a reasonably safe place or not.—*Pindell v. St. Louis & H. Ry. Co.*, 41 Mo. App. 84.

**App. 1894.** Where goods arrive out of time, the carrier should notify the consignee of their arrival; also, where it is the carrier's custom to give notice, even when they arrive on time; and if, after diligent inquiry,

the consignee cannot be found, or if he fails to remove them in a reasonable time after receiving notice, the carrier may store them, and his liability will then be that of a warehouseman.—*Frank v. Grand Tower & C. Ry. Co.*, 57 Mo. App. 181.

**App. 1897.** The liability of a common carrier as insurer of perishable goods terminates, and its liability as warehousekeeper begins, on the arrival of the goods at the place of delivery on time, and the consignor's right to recover, if any he has, is dependent upon a breach of the carrier's contract, not to carry, but to deliver the goods after arrival; and where notice of arrival is given to the consignee, the risk, after such notice and a reasonable time thereafter for the consignee to call for the goods, is that of the owner, and not of the carrier.—*Helf & Friedrichs Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

**App. 1916.** A railroad, whose relation to goods at the time of their destruction by fire is that of warehouseman, is only liable for negligence.—*Dancinger Bros. v. Chicago, R. I. & P. Ry. Co.*, 182 S.W. 120. See Carriers, 145 in this Digest.

**App. 1928.** Notice to consignee before shipment reached point of delivery held insufficient to start 48-hour period after which carrier's liability as such ceased; "notice of arrival."—*Hoyland Flour Mills Co. v. Missouri Pac. R. Co.*, 5 S.W.(2d) 125, certiorari denied *Erie R. Co. v. Hoyland Flour Mills Co.*, 48 S. Ct. 433, 277 U. S. 586, 72 L. Ed. 1001.

141. **Special contracts for storage.**  
See explanation, page iii.

142. **Duties of carrier as warehouseman.**

**App. 1883.** Rev. St. § 556, provides that no warehouseman or other person shall sell, incumber, or permit to be shipped beyond his control any goods for which a receipt shall have been given by him, whether received for storing, etc., or other purpose, without the written consent of the one holding such receipt; and section 561 provides that all the provisions of such chapter shall be applicable to bills of lading and to all persons, their agents and servants, that shall or may issue bills of lading of any kind or description. *Held*, that these statutes do not mean that when goods are consigned to "shippers' orders," and the order of the shipper or his agent, though not in writing, is obey-

ed by the carrier, the carrier is to be liable to the shipper if the agent disobeys secret instructions of the shipper, whereby the goods or the proceeds are lost to the shipper, because the agent's orders were not given in writing.—*Watson v. Hoosac Tunnel Line Co.*, 13 Mo. App. 263.

143. Acts or omissions constituting negligence.

**Sup. 1894.** A railroad company is only bound to use the same diligence to save freight stored in its warehouse, at its destination, from fire, as it uses to save its own property, where the shipper has been notified that it is held subject to his order and at his risk.—*E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 26 S.W. 704, 122 Mo. 258.

**App. 1876.** There were two men in St. Charles named H. H. A merchant at a distance received an order for goods, signed "H. H.," and knowing of H. H. No. 1, to whom he was willing to sell, forwarded the goods by railroad. The company tendered the goods to H. H. No. 1, who said he had not ordered them, and refused them, and the company then stored them as warehouseman. H. H. No. 2 then appeared and produced bill of lading, and demanded the goods. The company delivered them to him, and he absconded with them, the price remaining unpaid to the seller, who then sued the company on the ground of misdelivery. *Held*, that the company, as warehouseman, was liable for due diligence only, and that it was not chargeable, under the circumstances, with negligence.—*Bush v. St. Louis, K. C. & N. Ry. Co.*, 3 Mo. App. 62.

144. Proximate cause of loss.

*See explanation, page iii.*

145. Extent of liability.

**App. 1916.** A railroad, whose relation to goods at the time of their destruction by fire is that of warehouseman, is only liable for negligence.—*Dancinger Bros. v. Chicago, R. I. & P. Ry. Co.*, 182 S.W. 120.

146. Actions involving liability as warehouseman.

**Sup. 1894.** In an action against a common carrier for the loss of freight stored in its warehouse at its destination, subject to the shipper's order, where plaintiff alleges that defendant negligently permitted it to be burned, the burden is upon him to show that fact.—*E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 26 S.W. 704, 122 Mo. 258.

**App. 1890.** Where, in an action against a carrier for the loss of goods by fire while in a warehouse between the place of shipment and the place of delivery as specified in the bill of lading, the carrier alleged that the shipper directed that they be delivered at the place where destroyed, as to which the evidence was conflicting, it was error to refuse to instruct that the burden was on defendant to show that the plaintiff gave directions for the delivery of the goods at the place where lost.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

Where, in an action against a carrier for loss of goods by fire while in a warehouse at a point between the place of shipment and destination as shown by the bill of lading, there was no evidence tending to show a special contract exonerating the carrier from liability for loss in case of fire, defendant having set up an agreement to accept the goods at the place where lost, it was error to refuse to instruct that the verdict must be for plaintiff, unless the jury believe from the evidence that the plaintiff agreed to accept the goods in controversy at the place where destroyed.—*Id.*

**App. 1895.** The evidence in an action for the destruction of plows in defendant's warehouse concedes that the goods were stored exclusively for plaintiff's accommodation, and there was no suggestion that they were stored for hire, and that defendant was as careful of plaintiff's goods as of its own. The fire was caused by the explosion of a lantern which had just been filled by defendant's porter, who was a careful man, and owing to the material of the building, and also that its floors were greasy and oily, the fire spread so rapidly that the freight could not be removed. *Held*, that the court did not err in taking the case from the jury; there being no evidence of gross negligence.—*Hapgood Plow Co. v. Wabash Ry. Co.*, 61 Mo. App. 372.

A petition in an action for the value of plows destroyed by fire in defendant's warehouse sought to charge defendant as warehouseman, but did not state that it was a bailee for hire, or that plaintiff either paid or offered to pay anything for the storage, and sought a recovery for the entire value of the goods, without deduction for storage charged. While charging negligence, it did not state any degree of negligence. *Held* to state nothing incompatible with a bailment without consideration.—*Id.*

**App. 1924.** While a carrier as warehouseman is not an insurer of goods and can be held liable for loss of them only on proof by shipper of negligence, a presumption of negligence arises against the warehouseman from the mere showing of a loss or injury which must be explained away by the warehouseman.—*Viviano v. Davis*, 258 S.W. 69.

In an action against carrier as such or as warehouseman for loss of portion of shipment returned to plaintiff on consignee's refusal to accept, where plaintiff testified he delivered the goods to defendant in good condition and it was conceded the goods were in defendant's possession from that time until again delivered to plaintiff, but defendant did not attempt to show why all the goods were not returned or what became of the goods missing, plaintiff *held* to have sustained the burden of proof of negligence of defendant.—*Id.*

**App. 1928.** In determining whether notice of arrival was sent after arrival at point of delivery of shipment consigned to New York City for export, evidence of custom as to delivery at docks *held* competent.—*Hoyland Flour Mills Co. v. Missouri Pac. R. Co.*, 5 S.W.(2d) 125, certiorari denied *Erie R. Co. v. Hoyland Flour Mills Co.*, 48 S. Ct. 433, 277 U. S. 586, 72 L. Ed. 1001.

## (II) LIMITATION OF LIABILITY.

Carriage of live stock, see post, ¶218.  
Injuries to passengers, see post, ¶307.  
Of connecting carriers, see post, ¶180.

### ¶147. Nature of right to limit liability.

**App. 1876.** A carrier may, by special contract, limit his common-law liability.—*Kirby v. Adams Express Co.*, 2 Mo. App. 369.

**App. 1894.** Contracts limiting the liability of common carriers to a specified amount are valid, when supported by a valuable consideration.—*Duvenick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550.

**App. 1909.** It is the duty of a common carrier to carry without any contract limiting its liability, which duty it may be compelled to perform when compensation for the services is tendered.—*Burgher v. Wabash R. Co.*, 120 S.W. 673, 139 Mo. App. 62.

**App. 1910.** Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, §

7, 34 Stat. 593), providing that a carrier issuing a bill of lading shall be liable to the owner thereof for any injury to the property "caused" by it or any connecting carrier, and that no contract shall exempt the carrier from such liability, prohibits a carrier from limiting its liability; the word "caused" being coextensive with the measure of the carrier's liability at common law.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1910.** A carrier's liability cannot be limited unless the limitation is a reasonable one.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

**App. 1915.** Provision of a contract of interstate shipment, limiting liability for loss and injury, is valid.—*Ball v. Lusk*, 175 S.W. 238, 189 Mo. App. 297.

**App. 1926.** Strike clause in contract of carriage *held* valid, even though a strike was in existence at time contract was made.—*Mourer v. Wabash Ry. Co.*, 280 S.W. 1050.

### ¶148. What law governs.

**Sup. 1892.** In an action brought in Missouri against a railroad company for the value of cotton destroyed in transitu by fire, it appeared that the bill of lading was made in Texas, and the cotton was shipped to Massachusetts. Defendant answered, setting up a provision in the bill of lading that "this company shall not be liable for loss or damage by fire," to which plaintiff pleaded in reply a statute of Texas, declaring void any limitation by carriers of their common-law liability, but it appeared that the statute did not apply to shipments to points without the state. *Held*, that it was error to refuse an instruction that the bill of lading, being a through one, should be construed by the laws of Missouri, as such instruction would be equivalent to disregarding the statute pleaded, and place defendant's liability solely under the common law, equally in force in both states.—*Otis Co. v. Missouri Pac. Ry. Co.*, 20 S.W. 676, 112 Mo. 622.

**App. 1890.** Where a contract for the carriage of freight from one state to another contained a limitation on the carrier's common-law liability, the question as to what is to be deemed evidence of the shipper's assent to the limitation is to be determined by the laws of the state where the contract was made, and not by the laws of the state where the goods were to be delivered and a suit for their loss was brought.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

**App. 1891.** A bill of lading acknowledging the receipt of the goods, "to be transported from Hillsboro, Texas, to Galveston, and delivered to the consignees, or a connecting common carrier," though designating a point in another state as the destination, and guarantying a through rate of shipment, is a contract to be performed wholly within the state of Texas, and as such within the provisions of the statute of Texas, prohibiting carriers from restricting their common-law liability.—*Bennitt v. Missouri Pac. Ry. Co.*, 46 Mo. App. 656.

149. **Liabilities subject to limitation.**

149½. — **In general.**

**Sup. 1867.** Where cotton delivered to a railroad company for transportation, upon a receipt on which is stamped, "At owner's risk of fire," is lost by fire while in the company's possession, on a train, the company is not liable if the persons in charge of the train took all reasonable care, and observed all reasonable precautions, in the management and conduct of the train, and if the car containing the cotton was reasonably tight and suitable for its transportation.—*Levering v. Union Transp. & Ins. Co.*, 42 Mo. 88, 97 Am. Dec. 320.

**Sup. 1884.** A common carrier may limit his liability as to goods after they arrive at their destination, except as to loss occurring through fraud or want of good faith.—*Gashweller v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 112, 53 Am. Rep. 558.

**App. 1889.** A common carrier may, by contract, limit its liability for all accidents which are not the result of its own negligence or that of its agent.—*Baker v. Missouri Pac. Ry. Co.*, 34 Mo. App. 98.

**App. 1893.** A carrier must furnish vehicles to safely carry on his business of transportation, his calling implying that he will do business for the public with reasonable safety and security to the property of those who patronize him, and it is so much his duty to do so that public policy will not permit him to make a contract exonerating him for a failure so to do.—*Haynes v. Wabash R. Co.*, 54 Mo. App. 582.

**App. 1906.** A carrier may, with the assent of the shipper, fairly obtained and on a sufficient and lawful consideration, restrict its common-law liability to such damages as result from negligence.—*Ficklin v. Wabash R. Co.*, 93 S.W. 847, 117 Mo. App. 221.

**App. 1914.** A carrier engaged in interstate commerce under the federal law may not contract for freedom from liability for negligence of itself or its servants, but may provide for speedy written notice of loss and for reasonably short limitation of an action against it.—*Sims v. Missouri Pac. Ry. Co.*, 163 S.W. 275, 177 Mo. App. 18.

**App. 1925.** Carrier may limit its liability under federal statutes and common law, for damages caused by unreasonable delay in transporting except as to its own negligence.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

Carrier should be enabled to limit liability for delay by contract, with burden of proving itself free of negligence.—*Id.*

150. — **Negligence or misconduct.**

Carriage of live stock, see post, 218.

A stipulation in a bill of lading releasing the carrier from liability for its negligence is void as against public policy.

—**Sup. 1887.** *McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721; (1890) *Witting v. St. Louis & S. F. Ry. Co.*, 14 S.W. 743, 101 Mo. 631, 10 L. R. A. 602, 20 Am. St. Rep. 636; (1894) *E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 26 S.W. 704, 122 Mo. 258;

**App. 1905.** *Jones v. St. Louis & S. F. R. Co.*, 91 S.W. 158, 115 Mo. App. 232; (1906) *Griffin v. Wabash R. Co.*, 91 S.W. 1015, 115 Mo. App. 549; *Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211; *Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

Though common carriers may limit their common-law liability by special contracts, they cannot thus protect themselves against the consequences of their own negligence.

—**Sup. 1873.** *Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 390; (1875) *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199; (1876) *Snider v. Adams Express Co.*, 63 Mo. 376; (1877) *Oxley v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 629;

**App. 1899.** *Nickey v. St. Louis, I. M. & S. Ry. Co.*, 35 Mo. App. 79; (1899) *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

**Sup. 1867.** A common carrier may not restrict his liability so as to exempt himself from liability for losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee.—*Levering*

v. Union Transp. & Ins. Co., 42 Mo. 88, 97 Am. Dec. 320.

**Sup. 1924.** Contracts by common carriers and similar public service corporations to exempt themselves from either total or partial liability for negligence are void as against public policy regardless of whether they rest upon a consideration.—*State ex rel. Western Union Telegraph Co. v. Public Service Commission*, 264 S.W. 669, 304 Mo. 505, 35 A. L. R. 328.

**App. 1876.** An express company cannot, by contract limiting its liability for loss of or damage to goods, shield itself from liability for its carelessness or neglect.—*Kirby v. Adams Express Co.*, 2 Mo. App. 369.

**App. 1889.** A common carrier is excused from delivery of goods when they have been seized under legal process, but is not relieved from liability for failure to deliver goods by showing that a city marshal, acting as deputy sheriff of a county, seized the goods pursuant to a telegram from a sheriff of another county holding a writ of attachment against the shipper, even though the carrier is under a special contract exempting it from liability, as such contract cannot exempt it from the negligence of its employes.—*Nickey v. St. Louis, I. M. & S. Ry. Co.*, 35 Mo. App. 79.

**App.** A carrier cannot contract against its own negligence.—(1890) *Conover v. Pacific Express Co.*, 40 Mo. App. 31; (1897) *Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 68 Mo. App. 255; (1909) *Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276; (1911) *Ieas v. Quincy, O. & K. C. R. Co.*, 136 S.W. 963, 157 Mo. App. 455.

**App. 1910.** A shipper may by the written contract of shipment release for a valuable consideration the carrier from damages from its prior negligent delay in providing cars or loading the shipment.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1917.** A carrier cannot exempt itself by contract from liability for its negligence in not furnishing safe vehicles for transporting goods.—*McDaniel Milling Co. v. Missouri Pac. R. Co.*, 191 S.W. 1021.

**App. 1925.** Strike not as matter of law negligence, and stipulation exempting carrier from liability for delay on account thereof in transporting interstate shipment is valid, if made in good faith.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

### —151. Mode or form of limitation.

**Sup. 1924.** Basing of rates by common carriers and similar public service corporations in part on liability involved in a given service is determination in advance of the maximum amount thereof, a liquidation of the damages contingent upon nonperformance of the service, and is not a limitation of liability for negligence.—*State ex rel. Western Union Telegraph Co. v. Public Service Commission*, 264 S.W. 669, 304 Mo. 505, 35 A. L. R. 328.

**App. 1897.** A contract between a shipper and a carrier to limit the liability of the latter in case of loss must be founded on a special agreement, to which the shipper assented, for a lower rate of freight than would have been charged but for such special contract, and the consideration of reduced compensation will not be presumed in the absence of proof from the agreement limiting the carrier's liability.—*Kellerman v. Kansas City, St. J. & C. B. Ry. Co.*, 68 Mo. App. 255.

**App. 1911.** The mere fact that a shipper shipped under a rate prescribed for limited liability, instead of under a greater rate, prescribed for unlimited liability, would not operate as a limitation upon the carrier's common-law liability; nor would the additional fact, in case of an interstate shipment, that the rates in force were on file with the Interstate Commerce Commission and duly posted in the carrier's depots and freight offices, as required by the interstate commerce act, operate as constructive knowledge, sufficient as a basis of a contract limiting liability of the carrier through an acceptance, by the mere act of shipping the goods under the lesser rate.—*Drey & Kahn Glass Co. v. Missouri Pac. Ry. Co.*, 136 S.W. 757, 156 Mo. App. 178.

**App. 1914.** Under the federal regulations of interstate shipments, a carrier cannot, by mere stipulation in an independent contract, such as a lease of an elevator having no connection with a contract for the shipment of goods, relieve itself of its liability as a common carrier for the loss of goods.—*Morrison Grain Co. v. Missouri Pac. Ry. Co.*, 170 S.W. 404, 182 Mo. App. 339.

### —152. — Notice.

*See explanation, page iii.*

### —153. — Bill of lading or shipping receipt.

**App. 1876.** A special contract limiting the liability of a common carrier may be es-



established by showing the consignor's acceptance of a receipt stating a limitation.—*Kirby v. Adams Express Co.*, 2 Mo. App. 369.

**App. 1890.** Under Hurd's Ill. St. 1874, p. 268, § 1, providing that, whenever any property is received by a common carrier to be transported it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property by any stipulation or limitation expressed in the receipt given for such property, and the decision of the courts of Illinois, the acceptance of a receipt or bill of lading with printed conditions or notice limiting the carrier's liability without dissent will not establish the contract of limitation, but such assent must be shown by other and additional evidence.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

**App. 1903.** An express company acting as a collector cannot limit its liability as such for accepting a draft instead of money to that of a forwarder, nor to a definite sum, by stipulations in its receipt given for the claim to be collected.—*Gowling v. American Exp. Co.*, 76 S.W. 712, 102 Mo. App. 366.

**App. 1914.** Plaintiff, an experienced jewelry salesman, being compelled to ship jewelry cases by freight, *held* charged with actual notice of a stipulation on the back of the bill of lading exempting the carrier from liability except by special agreement containing the stipulated value of the articles indorsed thereon.—*Russell v. Quincy, O. & K. C. R. Co.*, 164 S.W. 164, 177 Mo. App. 186.

**App. 1918.** A bill of lading in an interstate shipment must be regarded as containing the entire contract upon which the responsibilities of the parties rest.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865, 199 Mo. App. 589, certiorari denied 39 S. Ct. 19, 248 U. S. 577, 63 L. Ed. 429.

**App. 1927.** Limitation, in bill of lading, of re-icing fruit car to regular icing stations, does not save carrier from liability for damages caused by failure of carrier to exercise care required to re-ice in transit.—*Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co.*, 297 S.W. 440, 220 Mo. App. 1316.

#### ⚡154. Consideration.

Carriage of live stock, see post, ⚡218.

**Sup. 1887.** Where parties agree on a fixed valuation of the property, and a special and reduced rate of freight is given and received, based on the condition that the car-

rier assumes liability only to the extent of the agreed value of the property, such stipulation is valid and binding and does not contravene the rule which forbids the carrier to stipulate against his own negligence.—*McFadden v. Missouri Pac. R. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**Sup. 1899.** A limitation in a shipping contract of the measure of recovery is not binding unless based on a special rate.—*Richardson v. Chicago & A. Ry. Co.*, 50 S.W. 782, 149 Mo. 311.

**Sup. 1900.** A contract of shipment of goods from one state to another stated that the rate charged was special, and given in consideration of a limited valuation placed on the goods, for which the carrier should be liable. The evidence showed that the rate charged for shipment was the regular rate. *Held*, that the contract of shipment did not limit the consignee's right to recover the full value of goods lost in transit, and the fact that the shipper was required to sign a stipulation that the carrier's liability should not exceed a certain amount, in order to get the rate charged plaintiff, does not show that the rate charged was not the regular rate.—*Ward v. Missouri Pac. Ry. Co.*, 58 S.W. 28, 158 Mo. 226.

**Sup. 1918.** An agreement limiting recovery of damages for injuries to a shipment of rugs in bales to \$50 *held* invalid for want of consideration; there being no alternative rate for rugs so packed for the shipper to choose, and hence no consideration supporting the contract.—*Der Bogosian v. Atchison, T. & S. F. Ry. Co.*, 202 S.W. 1078.

**App. 1890.** Where the shipper of an express package which was valuable failed to state its value to the carrier's receiving agent, and the receipt given provided that the carrier should not be liable for any loss over \$50 unless the value of the article had been given, such provision was not binding on the shipper, there having been no contract for a lower freight rate in view of such value, and it not appearing that the shipper even knew what the rate would be, since the charges were to be paid by the consignee.—*Conover v. Pacific Express Co.*, 40 Mo. App. 31.

**App. 1894.** Where the uncontradicted evidence shows that the full freight rate was paid for a shipment, a contention that a clause in the bill of lading exempting the railroad from loss by fire was supported by a reduced rate cannot be sustained.—*Hance v. Wabash Western Ry. Co.*, 56 Mo. App. 476.

**App. 1894.** The fact that the freight rate charged in a given contract is the same rate charged everybody who ships under a like contract does not show that such rate is in fact a reduced rate; but where the carrier has in force, and for practical application, a higher rate for shipments made without contract for release than the rate charged in the contract containing such release, such contract has a sufficient consideration, and, in an action by the shipper for damages, defendant, may show such reduced rate to limit its liability to the amount stipulated in the contract.—*Duvenick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550.

**App. 1897.** The contract made by a carrier with the shipper in which the latter sought to limit its liability for loss by its negligence recited that "in consideration of tariff dollars per car the said railroad company agrees to transport one car" between two points specified. *Held*, that the contract does not show an agreement for a lower rate of freight as a consideration for the limitation of its liability, the tariff rate being one fixed by the railroad commissioners, and the one the carrier is authorized to charge where its liability is not limited.—*Kellerman v. Kansas City, St. J. & C. B. Ry. Co.*, 68 Mo. App. 255.

**App. 1898.** A recital in a contract for transportation, that the rate charged was less than the regular tariff rate, when such contract did not apply, has the effect of stating that there was a regular tariff rate for shipment not covered by special contracts, and that the rate charged was less than such higher rate, and therefore the recitals in the contract were prima facie evidence of the fact that there was a higher legal rate than that charged, and that the latter was a reduced rate, and hence a sufficient consideration for the exemption from liability for the loss of live stock shipped beyond \$100.—*Wyrick v. Missouri, K. & T. Ry. Co.*, 74 Mo. App. 406.

**App. 1903.** A contract limiting the liability of a carrier with respect to the shipment of goods must be supported by a sufficient consideration.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 74 S.W. 492, 101 Mo. App. 442.

The clause in a bill of lading limiting the carrier's liability will not be held valid on the ground that a reduced rate was intended, no rate being specified, and none being talked of by the parties.—*Id.*

**App. 1903.** A stipulation in a written contract of shipment placing a limited value on the property shipped in case of its loss by the default of the carrier, when not made in consideration of special or reduced rates, is not binding on the shipper.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1904.** Where a contract partially exempting a railroad from liability for injury to goods shipped was made in consideration of a reduced rate, but the company charged a rate in excess of that stipulated in the contract, it was not entitled to insist upon its exemption from liability.—*Hendrix v. Wabash R. Co.*, 80 S.W. 970, 107 Mo. App. 127.

**App. 1906.** Where a carrier failed to comply with the interstate commerce act, requiring the posting of a schedule of rates at all stations, etc., a limitation of liability in an interstate shipment, recited to be in consideration of reduced rates, was void for want of consideration, as the carrier had under the circumstances but one rate.—*Griffin v. Wabash R. Co.*, 91 S.W. 1015, 115 Mo. App. 549.

**App. 1906.** A stipulation in a contract of affreightment that the carrier shall not be liable for loss or injury to the goods unless a claim therefor is made in writing within five days after the arrival of the shipment at its destination is supported by sufficient consideration.—*Freeman v. Kansas City Southern Ry. Co.*, 93 S.W. 302, 118 Mo. App. 526.

**App. 1906.** A contract for the shipment of freight limiting the carrier's liability, in consideration of the shipper "securing a reduced rate of freight," can be sustained, if at all, only on proof of such consideration.—*Ficklin v. Wabash R. Co.*, 93 S.W. 847, 117 Mo. App. 221.

**App. 1906.** The agreement in a contract of affreightment to limit the carrier's liability in case of loss of the goods to \$5 per hundredweight fails for lack of consideration; the contract disclosing no consideration.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1906.** A railroad, in compliance with the Interstate Commerce Act placed on file with the Interstate Commerce Commission, a schedule of tariffs, showing two rates. The railroad subsequently contracted to carry goods. No freight rate was agreed to, either verbally or in the bill of lading, the latter not reciting that a reduced rate was charged.

*Held*, that no consideration was shown for a contract limiting the liability of the railroad on account of carrying the property for the lower rate.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 97 S.W. 256, 120 Mo. App. 566.

**App. 1907.** Provision in a bill of lading exempting the carrier from loss of the property by fire is valid only in case a reduced rate or other consideration is allowed the shipper therefor.—*Scott County Milling Co. v. St. Louis, I. M. & S. R. Co.*, 104 S.W. 924, 127 Mo. App. 80.

Provision in a bill of lading that the carrier's liability as such terminates on arrival of the property at the place of delivery, without which such liability continues till there has been reasonable time for removal of the property, requires a consideration to make it valid.—*Id.*

**App. 1908.** That a shipper received the benefit of a reduced freight rate applicable where the carrier's liability is limited supports a limited liability contract, regardless of a recital in the contract to that effect.—*Mires v. St. Louis & S. F. R. Co.*, 114 S.W. 1052, 134 Mo. App. 379.

Limitation of a carrier's liability in a contract to carry freight is void unless it appears from recitals in the contract or from other competent evidence that a reduced freight rate was given.—*Id.*

Where a contract to carry freight recites that, in consideration of a reduced freight rate, the carrier's liability shall be limited to a specified valuation, the shipper cannot show, in the absence of a showing of fraud or imposition, that he did not know that the carrier had a higher rate than that charged.—*Id.*

**App. 1909.** A stipulation fixing the value of property shipped at less than its real value must be supported by a consideration in order to limit recovery to the value fixed.—*Wilcox v. Chicago Great Western Ry. Co.*, 115 S.W. 1061, 135 Mo. App. 193.

**App. 1909.** A stipulation in a shipping contract that the carrier shall not be liable for injury unless notice thereof is given within a specified time is a limitation on the common-law liability and to be valid must be supported by an independent consideration.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S. W. 659, 137 Mo. App. 276.

**App. 1909.** There must be a consideration to sustain the stipulation in a bill of

lading making notice of a claim for damages to goods in transit a condition precedent to recovery by the shipper.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

**App. 1909.** A carrier may for a consideration limit its common-law liability.—*Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co.*, 120 S.W. 663, 140 Mo. App. 130.

**App. 1909.** A mere agreement of a carrier to transport does not furnish a consideration for an agreement to limit its common-law liability, but can only be effected by rendering to the shipper a special consideration, such as a reduced freight rate.—*Burgher v. Wabash R. Co.*, 120 S.W. 673, 139 Mo. App. 62.

Where a carrier's limited liability contract recited that it was given in consideration of a reduced freight rate, but plaintiff proved that there was no reduction in the rate charged in fact, and there was no other special consideration for a condition requiring notice of loss within 10 days, such condition was unsustainable.—*Id.*

**App. 1910.** A shipping contract, reciting that the charge for transportation was at the tariff rate, is a contract for the rate charged for shipments under a nonrelease contract, though it also recites that the rate is less than the rate charged for shipments at the carrier's risk, and hence there is no consideration for a stipulation releasing the carrier from certain liability.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1910.** Mere agreement for transportation between parties to a shipment will not support an agreement to limit the carrier's common-law liability; an independent consideration such as a reduced rate being necessary.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

If an agreed valuation was merely a cloak to limit liability to a sum less than the real value, the contract is not valid as against a loss due to negligence.—*Id.*

**App. 1910.** A contract of carriage limiting the liability of the carrier regardless of actual loss must be based on a consideration.—*Burns v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 1, 151 Mo. App. 573.

**App. 1911.** A common carrier may, for a valuable consideration, limit the amount of damages to be paid the owner for any loss

or injury to the shipment by the carrier's negligence, but a stipulation placing a limited valuation on the property shipped, in case of loss by the carrier's fault, when not made in consideration of special or reduced rates, is not binding on the shipper.—*Leas v. Quincy, O. & K. C. R. Co.*, 136 S.W. 903, 157 Mo. App. 455.

Where a carrier had but one regular rate applicable to a given class of property, it is not a reduced or a special rate that will serve as a consideration for an owner's risk contract, as the word "reduced" implies a comparison, and it is not permissible to go outside the subject-matter to seek the comparison; but it must be made with another higher rate on the same class of property, and where there is no such rate there can be no reductions.—*Id.*

**App. 1914.** A general provision in a bill of lading covering an interstate shipment that claims for damage must be made in writing to the carrier, within four months after delivery, or after reasonable time has elapsed for delivery, in order to make the carrier liable, is valid, though not supported by any special consideration.—*Johnson Grain Co. v. Chicago, B. & Q. R. Co.*, 164 S.W. 182, 177 Mo. App. 194.

**App. 1916.** Under Interstate Commerce Act, §§ 2, 3, an interstate carrier may fix a reduced rate limiting its liability, and such limitations are valid if the rates be open to all.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S.W. 149, 194 Mo. App. 396.

**App. 1916.** Stipulation in contract of shipment placing a limited valuation on the property shipped in case of loss by the default of the carrier, when not made in consideration of a special or reduced rate of shipment, is not binding on the shipper.—*Wilson v. Chicago Great Western R. Co.*, 190 S.W. 22.

**App. 1923.** If stipulations printed on the back of a receipt issued by a carrier, and providing that a suit for loss of shipment must be brought within a certain time, rise to the dignity of a contract, there must have been a consideration for it, otherwise the statutory limitations apply.—*Peters v. American Ry. Express Co.*, 256 S.W. 100.

←155. **Assent of consignor or owner.**  
See ante, ←154.

Admissibility of evidence, see post, ←164.  
Carriage of live stock, see post, ←218.

**Sup. 1876.** Where stipulations limiting the liability of a carrier are contained in the

body of a receipt given to the consignor in a way not calculated to escape observation, such stipulations composing a part of it, being plainly written or printed, and the instrument itself showing on its face that it is not merely a receipt, and it being accepted by the consignor in the transaction of the business to which it related, it was his duty to read it, and in the absence of proof of fraud, imposition, or deceit, the law presumes that he had knowledge of its contents. It is not the carrier's duty to call the consignor's attention to the stipulations.—*Snider v. Adams Express Co.*, 63 Mo. 376.

**App. 1897.** A special contract exonerating a carrier from liability for negligence must be assented to by the shipper in order to be binding on him.—*Kellerman v. Kansas City, St. J. & C. B. Ry. Co.*, 68 Mo. App. 255.

**App. 1910.** The public may insist on property being accepted for transportation by carriers without any limitation of their responsibility.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

Though carriers may restrict their liability as insurers, such privilege is for the benefit of the public, as well as of carriers, and does not permit the carriers to impose conditions restricting liability, whether patrons desire such terms or not, but for such a limitation to be valid the carrier must be willing to assume the full responsibility imposed by law, and must allow the owner the privilege of choosing between a restricted and full liability.—*Id.*

**App. 1910.** A carrier's liability cannot be limited without the shipper's assent.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

←156. **Operation and effect of limitation in general.**

Carriage of live stock, see post, ←218.

←156 (1). **In general.**

**Sup.** Where the loss of or injury to a cargo, shipped on a railroad, occurs from any of the causes excepted in a bill of lading, in order that the company may be relieved from liability, it must appear that the exception named is the proximate and sole cause of the damage. If the negligence of the carrier mingles with it as an active and co-operative cause, the carrier will be responsible.—(1875) *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199; (1877) *Oxley v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 629.

**Sup. 1899.** Terms in a contract in derogation of law are, like provisions in a statute in derogation of the common law, construed strictly. For instance, it is so when a common carrier undertakes, to limit his liability by a special agreement with the party. He can claim nothing beyond what is plainly within the words.—*Richardson v. Chicago & A. R. Co.*, 50 S.W. 782, 149 Mo. 311.

**App. 1885.** Where a seller of goods delivers them to a common carrier to be transported to the buyer, the seller's agreement with the carrier, limiting the latter's liability, is binding on the buyer in the absence of any showing that the seller disclosed the fact that he was acting as agent of the buyer.—*Craycroft v. Atchison, T. & S. F. Ry. Co.*, 18 Mo. App. 487.

**App. 1903.** A shipper, by suing on a contract evidenced by a bill of lading, does not admit that the provision therein limiting the carrier's liability is valid, and supported by consideration.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 74 S.W. 492, 101 Mo. App. 442.

**App. 1909.** A shipping contract stipulating that in consideration of a reduced rate the shipper releases the carrier for breach of any contract to furnish cars at any particular time releases a claim for damages for failure to furnish cars at a time agreed on, which damages had accrued when the contract was signed.—*Freeman v. St. Louis & S. F. R. Co.*, 122 S.W. 1, 138 Mo. App. 322.

**App. 1909.** Proof that brine had run off fish shipped in barrels, and that the barrels during transportation had been punctured, and that the fish were injured thereby, did not prove a leakage within the bill of lading, relieving the carrier from liability for damages caused by leakage.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 122 S.W. 362, 143 Mo. App. 42.

**App. 1910.** Where a shipper had bulk corn, which was shipped in a stock car, sacked en route without removing it from the car, and redelivered it for transportation under a bill of lading providing that damage on account of being loaded in a stock car was at the owner's risk, the carrier was not liable for damage to the corn by it being loaded in the stock car.—*Nicholson v. St. Louis & S. F. R. Co.*, 124 S.W. 573, 141 Mo. App. 199.

156(2). **Loss caused by negligence or wrongful act of carrier.**

**Sup. 1875.** Notwithstanding that, by the bill of lading, it was stipulated that a cargo

of potatoes was to be carried by a railroad at the owner's risk of freezing, held, that the road would be liable for all such damage caused by the failure to forward the potatoes with reasonable dispatch.—*Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 190.

**App. 1910.** The exemptions and restrictions stipulated for in a contract of carriage do not relieve the carrier from liability for the consequences of its own negligence.—*Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S.W. 1185, 141 Mo. App. 453.

157. **Limitation to liability of forwarder or warehouseman.**

**Sup. 1884.** After goods have arrived at their destination, the responsibility of the carrier therefor may be controlled by a special contract between the parties, or a local custom.—*Gashweiler v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 112, 53 Am. Rep. 558.

**Sup. 1894.** Under a stipulation in a bill of lading that the company "agree to forward" and deliver the freight to the consignee, "the damages incident to railroad transportation, loss or damage by fire or the elements while at depots excepted," the company is not liable for damages from those causes at depots where the cars containing the freight stop while in transit.—*E. O. Standard Milling Co. v. White Line Cent. Transit Co.*, 26 S.W. 704, 122 Mo. 258.

**App. 1876.** A provision in a bill of lading issued by a carrier that, if the goods are not removed within 24 hours after their arrival at their destination, the carrier shall be liable only as a warehouseman, is binding.—*Bush v. St. Louis, K. C. & N. Ry. Co.*, 3 Mo. App. 62.

158. **Limitation of amount of liability.**

Carriage of live stock, see post, 218.

159(1). **In general.**

**Sup. 1887.** Whether a stipulation in a contract of shipment, whereby a common carrier limits his liability to a certain fixed sum for each head of stock to be transported, shall limit the shipper to such sum in case the goods are destroyed by the carrier's negligence, depends on the fact whether the shipper has received adequate consideration for the concession. If obtained from the shipper by a false representation that his goods are to be carried at a special and reduced rate in consequence thereof, such a stipulation is not binding upon him, in the absence of bad faith on his part towards the

carrier.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**Sup. 1922.** A provision in bills of lading that the measure of damages for loss of the goods shall be the value of the goods at the time and place of shipment, and not of destination, is valid and binding on the parties.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88.

**App. 1892.** It is competent for a railroad company to enter into a special contract for the shipment of goods providing that the damages recoverable for injury to the goods or mistake in shipment shall be the value of the goods at the place of shipment.—*Rogan v. Wabash Ry. Co.*, 51 Mo. App. 665.

**App. 1897.** Where a shipment is made under a contract which places a valuation on the goods shipped of \$5 per 100 pounds, and provides that in case of damage done to the goods the shipper should only recover for actual damage done, which in no case should exceed the agreed valuation, and the goods shipped are damaged only, and not totally destroyed, the shipper is entitled to recover only the proportionate value fixed by the contract.—*Goodman v. Missouri, K. & T. Ry. Co.*, 71 Mo. App. 460.

**App. 1899.** A bill of lading issued by a carrier provided that the amount of damage accruing to the owner of the goods shipped. In so far as the same should fall on the initial or any connecting carrier, should be computed by the value of the said goods at the place and time of shipment, and that the company paying such loss should have the full benefit of an insurance that might have been effected upon or on account of said goods. *Held*, that the stipulation was meant to cover the loss or damage done to the goods themselves, and did not cover the owner's damage sustained by reason of a mere failure to carry or deliver the goods in a reasonable time.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

**App. 1910.** A provision in the bill of lading fixing the measure of damages for loss of property *held* not to fix the measure of damages for delay in transportation.—*Morrow v. Missouri Pac. Ry. Co.*, 123 S.W. 1034, 140 Mo. App. 200.

**App. 1910.** Where a contract in the bill of lading provided that no carrier should be liable for more than the value of the goods at the time and place of shipment, the measure of damages was the difference in value at the point of shipment; and an instruction, in an

action for damages to the goods, setting two markets, that at the point of shipment, and that of the destination, was erroneous.—*Dean v. Toledo, St. L. & W. R. Co.*, 128 S.W. 10, 148 Mo. App. 428.

**App. 1913.** Where a bill of lading limited the carrier's liability in case of loss to ten times the freight, it was immaterial, in an action on the contract for loss of goods, that prior to its execution the carrier's agent was notified that the goods were worth close to \$5,000.—*American Silver Mfg. Co. v. Wabash R. Co.*, 156 S.W. 830, 174 Mo. App. 184.

Where freight was shipped in interstate commerce at a rate granted on condition that the carrier's liability be limited to ten times the freight, such limitation was valid under the Interstate Commerce Act and its amendments, and in the absence of fraud fixed the amount of plaintiff's recovery in an action on the contract for loss of the goods.—*Id.*

**App. 1916.** A contract provision limiting the amount of recovery in case of loss or damage to an interstate commerce shipment is valid.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S.W. 141, 193 Mo. App. 610, transferred from Supreme Court 184 S.W. 1149.

**App. 1916.** Under contract of shipment, stipulation that carrier should be liable for damage computed on the bona fide invoice price, if any, to the consignee, the shipper of soda fountain purchased for \$100, though actually forth \$250, could recover only the cost price, where it was destroyed in transit.—*Wilson v. Chicago Great Western R. Co.*, 190 S.W. 22.

**App. 1918.** Where the bill of lading stipulated the measure of damages in case of loss or damage to goods, the amount of damages should be governed thereby, although, in the absence of such a provision, the measure of damages would have been otherwise.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865, 199 Mo. App. 589, certiorari denied 39 S. Ct. 19, 248 U. S. 577, 63 L. Ed. 429.

**App. 1921.** Even in case of a conversion by the carrier of an interstate shipment of lumber, the measure of damages is its market value at the time and place of conversion, and a provision limiting recovery to its value at the place of shipment is void, since it would prevent recovery of the full actual loss if enforced.—*Ruschow Lumber Co. v. Hines*, 229 S.W. 451, 206 Mo. App. 681.

**App. 1923.** A provision, in a bill of lading for interstate shipment, that damages are

to be estimated at point of shipment, would be of no avail under the Carmack Amendment to the Interstate Commerce Act.—*Taylor v. St. Louis & H. R. Co.*, 256 S.W. 499.

**App. 1925.** Provision in bill of lading limiting damages unenforceable.—*Marshall Land & Mercantile Co. v. Missouri Pac. R. Co.*, 270 S.W. 422.

**App. 1928.** To avoid liability for value of thing destroyed in transit, carrier must obtain written agreement from shipper limiting liability (Hepburn Act, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Hunter v. American Ry. Express Co.*, 4 S.W.(2d) 847.

158 (2). Limitation of amount where value is not disclosed.

**App. 1897.** Where the shipper and carrier by the terms of the contract of shipment have agreed that the value of the goods at the point of shipment shall be the measure of damages in case of loss, it is error to give an instruction fixing the measure of plaintiff's damages at the value of the goods at the place of destination, allowing no deduction for freight.—*Horner v. Missouri Pac. Ry. Co.*, 70 Mo. App. 285.

**App. 1908.** Under the law of New York where the shipper of goods states no value, the carrier is liable for the actual value of goods negligently lost, but one who under-values to obtain a lower rate risks the difference between the real value of the goods and the lesser value assumed in the carrier's receipt.—*Townsend & Wyatt Dry Goods Co. v. United States Express Co.*, 113 S.W. 1161, 133 Mo. App. 683.

158 (3). Loss caused by negligence or wrongful act of carrier.

**Sup. 1881.** A contract between a carrier and shipper, limiting the right of recovery, in case of injury to or loss of the property, to a sum agreed on as its true value, does not exempt the carrier from liability for its negligence, and is enforceable.—*Harvey v. Terre Haute & I. R. Co.*, 74 Mo. 538.

**App. 1907.** A stipulation in a bill of lading that the damage shall be computed at the value of the goods at the place and time of shipment is valid when fairly made, even though the loss occurs by the carrier's negligence and the stipulation is not supported by a reduced rate of freight or other special consideration.—*Gratlot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

**App. 1908.** A carrier of goods can limit its liability for negligence when the shipper fixes a valuation upon the goods, and agrees that the carrier's liability shall not exceed such value, where a higher rate is charged on goods of greater value.—*Townsend & Wyatt Dry Goods Co. v. U. S. Express Co.*, 113 S.W. 1161, 133 Mo. App. 683.

**App. 1908.** While a carrier cannot contract to exempt itself from liability for negligence in transporting property, a contract limiting liability to an agreed valuation will be sustained, if supported by a sufficient consideration.—*Mires v. St. Louis & S. F. R. Co.*, 114 S.W. 1052, 134 Mo. App. 379.

**App. 1912.** A stipulation in a bill of lading as to measure of damages held valid and enforceable.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

**App. 1916.** Under the Interstate Commerce Act and the Carmack Amendment, a bill of lading in accordance therewith, on an interstate shipment, stipulating that the loss or damage for which the carrier is liable shall be computed on the basis of the value of the property at the time and place of the shipment, etc., limits the carrier's liability, even in suit for its conversation of the goods.—*F. W. Brockman Commission Co. v. Missouri Pac. Ry. Co.*, 188 S.W. 920, 195 Mo. App. 607.

159. Requirement of notice of loss. Consideration of stipulation for notice, see ante, 154.

Limitation of liability in respect to livestock, see post, 218(3).

159 (1). In general.

**App. 1885.** A common carrier may stipulate that claims for loss or damage shall not be allowed nor sued for unless written notice, verified by affidavit, has been given.—*Brown v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 568.

**App. 1906.** Where a carrier learned of the damaged condition of a shipment on its arrival at the point of destination, and was afforded opportunity to investigate the nature and extent of the damage, the failure to give notice of damage, as required by the bill of lading, did not defeat a recovery.—*Hardin v. Missouri Pac. Ry. Co.*, 96 S.W. 681, 120 Mo. App. 203.

**App. 1910.** It is not an unreasonable condition in a shipper's contract that he be

required as a condition precedent to the carrier's liability to give notice of his claim.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

**App. 1911.** A stipulation in a shipping contract requiring notice of claim for injuries is not contrary to public policy, and is valid when reasonable in its application to the particular facts of the case.—*McKinstry v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 1061, 153 Mo. App. 546.

**App. 1915.** The requirement of a contract of shipment that notice of claim for loss be given at the point of shipment or delivery is not satisfied by mailing it to another point.—*Equity Elevator Co. v. Union Pac. Ry. Co.*, 177 S.W. 773.

**App. 1916.** A carrier of an intrastate shipment may incorporate in the contract of shipment a stipulation for written notice of damages.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S.W. 794, 192 Mo. App. 188.

**App. 1916.** Contract provision requiring written notice of loss or damages in interstate shipment cannot be waived.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S.W. 141. See Carriers, ☞ 32(2) in this Digest.

**App. 1918.** Shipper who, on day following delivery of shipment of meat, sent carrier's agent, at place of delivery, letter specifying shipment and notifying agent that meat was in spoil condition, that claim would be filed and that investigation of cause of damage should be made, substantially complied with the provision in bill of lading requiring claims in writing to be made to carrier at point of delivery or at point of origin.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865, 199 Mo. App. 589, certiorari denied, 39 S. Ct. 19, 248 U. S. 577, 63 L. Ed. 429.

Shipper, who sent letter to carrier's agent at point of delivery merely stating that shipment of meat was "soft and smeary" and requesting a report to enable company to complete its record, without placing blame on carrier or intimating that claim would be filed, did not substantially comply with provision in bill of lading requiring written notice of loss to carrier's agent.—*Id.*

Where bill of lading of shipment from Kansas City to New Haven provided for claim in writing to carrier at place of delivery or at place of origin, the sending of a formal written claim to carrier's freight claim agent in St. Louis was not a substantial

compliance with such provision, notwithstanding conference rulings Nos. 456 and 510 by the Interstate Commerce Commission.—*Id.*

**App. 1920.** Under express provision of Act Cong. March 4, 1915 (38 Stat. 1197), filing of notice of claim is not a condition precedent to recovery for damages from negligent delay in transportation of interstate shipment.—*Hunt v. Hines*, 223 S.W. 798, 204 Mo. App. 318.

**App. 1922.** Notice of a claim for damages to an interstate shipment is not required, where the loss or damage complained of was incurred while loading or unloading or in transit by the carrier's negligence.—*Whiteside v. Chicago, H. & St. P. Ry. Co.*, 239 S.W. 150.

#### ☞ 159 (2). Limitation of time for presenting claim.

**App. 1889.** A provision in a contract for the shipment of goods by express, that the express company should not be liable for any claim arising from the contract unless such claim was presented in writing 60 days from the date of the contract, did not limit the right to recover for breach of a subsequent parol contract by the company to return the goods to the shipper from their point of original destination, where they had been refused by the original consignee.—*Green v. Pacific Express Co.*, 37 Mo. App. 537.

**App. 1899.** A contract of shipment provided that no claim for damage to a shipper should be allowed unless made in writing and duly verified and delivered to the freight claim agent of the railway within five days after such goods arrive at their destination. It appeared from the evidence that four days after shipment plaintiff received a telegram informing him of the arrival of the apples shipped in a frozen condition, and the testimony of plaintiff showed that he could not know the nature and extent of his damages until a month after the same accrued. *Held*, that the rule in its application to the facts was unreasonable and compliance by plaintiff with its terms was impossible, and failure to so comply could not be made available to defeat the claims of plaintiff.—*Popham v. Barnard*, 77 Mo. App. 619.

**App. 1904.** The provision of a bill of lading that the shipper shall give notice of damages within five days after the arrival of the property at its destination relates to damages to the property, and not to damages resulting from a change in the market dur-



ing the wrongful delay in delivery.—*Loeb v. Wabash Ry. Co.*, 85 S.W. 118.

**App. 1906.** That a shipper of corn notified the carrier of injury to it due to delay as soon as he learned of it, did not excuse him from the operation of a provision in the contract of affreightment, that the carrier should not be liable for loss or damage unless the claim should be made therefor in writing within five days of the arrival of the shipment at its destination, where no effort was made for two weeks after the arrival of the shipment to learn its condition though the corn was shipped when the weather was such that injury might have been expected from delay.—*Freeman v. Kansas City Southern Ry. Co.*, 93 S.W. 302, 118 Mo. App. 526.

**App. 1907.** Though a bill of lading provides that claim for damages must be reported by the consignee to the delivering line within 36 hours after the consignee has been notified of the arrival of the freight, otherwise there shall be no liability, failure to give the notice does not prevent recovery, where the agent of the delivering company immediately knew about the destruction of the property while in its possession, and notice would have done no good.—*Scott County Milling Co. v. St. Louis, I. M. & S. R. Co.*, 104 S.W. 924, 127 Mo. App. 80.

**App. 1910.** The provision in a bill of lading that as a condition to liability of the carrier all claims for damages must be reported by the consignee in 36 hours after arrival of the goods, refers solely to loss of or damage to articles shipped, and not to special damages to the owner from delay in transportation.—*Morrow v. Missouri Pac. Ry. Co.*, 123 S.W. 1034, 140 Mo. App. 200.

**App. 1913.** Under the Interstate Commerce Act and its amendments, a provision in a bill of lading on an interstate shipment that a claim for loss should be made within four months after delivery, or, on failure to deliver, within four months after a reasonable time for delivery, *held* a valid limitation on the carrier's common-law liability, and that a delivery of the box in which goods claimed to be lost were shipped was a delivery of the property, so as to start the running of the time within which claim must be made.—*Joseph v. Chicago, B. & Q. R. Co.*, 157 S.W. 837, 175 Mo. App. 18.

**App. 1914.** Provision in a bill of lading that claims for delay should be made in writing within four months after delivery of the property *held*, not limited to damages

to the goods shipped, but to include injury to fruit to have been packed in the barrels shipped by their becoming overripe.—*Bailey v. Missouri Pac. Ry. Co.*, 171 S.W. 44, 184 Mo. App. 457.

**App. 1915.** Requirement of a contract of shipment for notice of claim for loss, to be given at point of delivery or shipment, within four months after delivery, is reasonable and valid.—*Equity Elevator Co. v. Union Pac. Ry. Co.*, 177 S.W. 773.

**App. 1916.** Where shipment is interstate, stipulation of bill of lading that any claim for loss or damage shall be made within four months after delivery to carrier, and, in case of failure to deliver to consignee, within four months after reasonable time for delivery, is valid.—*Banaka v. Missouri Pac. Ry. Co.*, 186 S.W. 7, 193 Mo. App. 345.

**App. 1916.** Provision in bill of lading, issued on interstate shipment, that claims for loss or damage should be made in writing at the point of delivery or origin, within four months after a reasonable time for delivery had elapsed, *held* valid.—*Kemper Mill Co. v. Missouri Pac. R. Co.*, 186 S.W. 8, 193 Mo. App. 466, transferred from Supreme Court *Kemper Mill & Elevator Co. v. Same* (1915) 178 S.W. 502.

**App. 1916.** The contract notice, requiring a shipper to give notice to the carrier within four months of loss or damage to interstate shipment, is for the purpose of giving the carrier opportunity to investigate the merits of the claim while the facts are fresh and information readily obtainable.—*R. W. Gess Commission Co. v. Illinois Cent. R. Co.*, 186 S.W. 1136, 193 Mo. App. 677.

Under an interstate shipping contract requiring the shipper to give written notice to carrier within four months of delivery, for loss, damage or delay, *held* that notice of damage to berries "on account of delay," could not mislead nor relieve the carrier of liability, where the damage was caused not by delay but by improper care in transit.—*Id.*

**App. 1917.** Where shipment is interstate, provision of bill of lading that claims must be made in writing to carrier at points of delivery or origin within four months, etc., is valid, and effect must be given it in case involving question of compliance.—*Barton v. Louisville & N. R. Co.*, 196 S.W. 379.

**App. 1918.** A bill of lading covering a shipment of meat, providing that claims for

loss, damage, or delay must be made in writing to the carrier at the point of delivery within four months, is binding upon the shipper.—*Cudahy Pucking Co. v. Atchison, T. & S. F. Ry. Co.*, 201 S.W. 623, 198 Mo. App. 520.

**App. 1928.** Filing written claim within 6 months and 15 days after date of express shipment is condition precedent to recovery for nondelivery (Interstate Commerce Act, as amended by Cummins Amendment [49 USCA § 20, par. 11]).—*Mt. Arbor Nurseries v. American Ry. Express Co.*, 300 S.W. 1051, 221 Mo. App. 241.

Verbal notice to carrier of claim for nondelivery within time specified in express receipt and statute was insufficient (Interstate Commerce Act, as amended by Cummins Amendment [49 USCA § 20, par. 11]).—*Id.*

—159 (3). **Waiver of notice of claim or defects therein.**

**Sup. 1900.** Where a contract of shipment provided that all claims for damages by the consignee must be reported in writing to the delivering line within 36 hours after he has been notified of the arrival of the freight, failure to give the notice will not defeat his right to recover for goods lost in transit, since notice of their arrival could not have been given, and written notice will be waived; the carrier having acted on the verbal notice of the consignee that the goods were lost, and delegated a claim agent to search for them.—*Ward v. Missouri Pac. Ry. Co.*, 58 S.W. 28, 158 Mo. 226.

**App. 1885.** A stipulation in a contract of shipment, that claims for injuries to the goods shipped will not be allowed unless notice thereof is given to the carrier within five days from the delivery of the goods to the consignee, may be waived by the acts and conduct of the carrier.—*Potts v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 394.

**App. 1890.** The acceptance of a letter containing a statement of a shipper's loss of goods in course of transportation, on the part of the carrier's agent, although not sworn to, constitutes a waiver of an agreement by the shipper to furnish the carrier with an affidavit of the amount of the loss within 24 hours after its occurrence, such letter being accepted within the prescribed time.—*Hess v. Missouri Pac. Ry. Co.*, 40 Mo. App. 202.

**App. 1890.** A carrier's bill of lading provided that the shipper's claim for damages

should be barred on his failure to give five days' notice of his claim "for loss or damage." *Held*, that the stipulation had no reference to what the shipper may have suffered by a change in the market during the negligent delay of the carrier in delivering the goods.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

**App. 1907.** Though a contract of shipment requires written notice of claim for damages to be made within 30 days, a notice is unnecessary where the carrier's agent attended the opening of the car with the consignee, listed the damaged goods and made report thereof to the carrier, who entered upon an investigation of the damages, and did not object to the form of notice.—*Nairn v. Missouri, K. & T. Ry. Co.*, 106 S.W. 102, 126 Mo. App. 707.

**App. 1909.** Where a carrier waives the omission of a shipper whose goods have been damaged in transit to give notice of its claim for damages as required by the bill of lading, the shipper's action for damages cannot be defeated by the omission.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

If it was the custom of a carrier to accept a verbal notice to its agents of a claim of a shipper for damage to goods and to treat it as a good notice, the custom would be binding on it.—*Id.*

**App. 1915.** Shipper's presentation of claim for damages as required by bill of lading *held* waived by carrier.—*Watson v. Union Pac. R. Co.*, 178 S.W. 871.

**App. 1916.** A carrier of an intrastate shipment may waive the stipulation in the contract of shipment for written notice of damage.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S.W. 794, 192 Mo. App. 188.

**App. 1916.** Railroad by accepting shipper's claim for loss after elapse of time stipulated and by declining to pay on other grounds than want of notice cannot commit discrimination by waiving requirement of notice in four months.—*Bauaka v. Missouri Pac. Ry. Co.*, 186 S.W. 7. See Carriers, —32(2) in this Digest.

**App. 1916.** Contract provision requiring claims respecting interstate shipment to be made within four months after delivery could not be waived.—*Kemper Mill Co. v. Missouri Pac. Ry. Co.*, 186 S.W. 8. See Carriers, —32(2) in this Digest.

**App. 1916.** Contract provision requiring written notice of loss or damage in interstate cannot be waived.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S.W. 141. See Carriers, 32(2) in this Digest.

**App. 1917.** Where defense of failure to give notice in shipping contract was complete when loss of goods through wrongful delivery was first brought to attention of road, road could not waive it by investigating claim and rejecting it on ground different than that of failure to give notice.—*Harelsan v. St. Louis & S. F. R. Co.*, 191 S.W. 1068.

**App. 1918.** Provisions of bill of lading made pursuant to Carmack Amendment on interstate shipment cannot be waived.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865. See Carriers, 32(2) in this Digest.

159 (4). **Loss caused by negligence or wrongful act of carrier.**

**App. 1910.** A provision in a shipping contract for notice to the carrier of a claim for damages because of negligence in the transportation is strictly enforced only when it is reasonable, and where the circumstances justify a strict enforcement as a means to protect the carrier against possible fraud.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1928.** Mere showing of nondelivery of express shipment did not obviate necessity for giving carrier timely written notice of claim (Interstate Commerce Act, as amended by Cummins Amendment [49 USCA § 20, par. 11]).—*Mt. Arbor Nurseries v. American Ry. Express Co.*, 300 S.W. 1051, 221 Mo. App. 241.

160. **Limitation of time to sue.**  
Carriage of live stock, see post, 218.

**App. 1886.** Where a contract of shipment provided that any action must be brought against the carrier within a specified time, the fact that a portion of the period limited in the contract was taken up by correspondence between the parties relative to plaintiff's claim did not relieve him of the obligation of the stipulation, where 12 days remained within which he might have instituted his suit after he was informed by defendant that his claim was rejected and would not be paid.—*Thompson v. Chicago & A. R. Co.*, 22 Mo. App. 321.

A provision in a contract of shipment requiring any action to be brought against the carrier within a specified time is not unavail-

ing against the shipper, because of the fact that a carrier may not stipulate against his own negligence, since such stipulation is not one against negligence.—*Id.*

**App. 1916.** A contract between shipper and carrier limiting the time in which actions may be brought for loss or damage to an interstate shipment is valid and reasonable.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S.W. 141, 193 Mo. App. 610, transferred from Supreme Court 184 S.W. 1149.

**App. 1927.** Provision in express receipt that suit for nondelivery of shipment must be brought within 2 years and day held reasonable.—*Goodwin & Jean v. American Ry. Express Co.*, 294 S.W. 100, 220 Mo. App. 695.

Suit for nondelivery of interstate shipment held barred by express receipt provision limiting time for bringing suit (Rev. St. 1919, §§ 1186, 9791, 9792).—*Id.*

161. **Limitation of liability as ground of defense.**

162. — **Pleading.**

**App. 1910.** If a shipper suing a carrier claims that his signature to the contract, which includes a release pleaded by the carrier, was fraudulently and wrongfully procured, that issue should be attended by proper allegations in the reply as provided for by Rev. St. 1899, § 654 (Ann. St. 1906, p. 670).—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

**App. 1912.** A carrier relying on a special contract restricting its common-law liability must allege and prove the special contract.—*Delerling v. Wabash R. Co.*, 146 S.W. 814, 163 Mo. App. 292.

**App. 1918.** Where a bill of lading provided that notice of loss should be given carrier at place of delivery or at place of origin within four months after date of delivery, carrier, in shipper's action for damages, was not estopped to assert noncompliance with such provision because it did not set up such defense until filing of second amended answer.—*Cudahy Packing Co. v. Bixby*, 205 S.W. 865, 199 Mo. App. 589, certiorari denied 39 S. Ct. 19, 248 U. S. 577, 63 L. Ed. 429.

163. — **Presumptions and burden of proof.**

**Sup. 1864.** In an action against a common carrier for a loss, by the perils of navigation within the exceptions of the bill of lading, it is sufficient for the defendant to

prove that fact generally, and he is not obliged to show affirmatively the particular and identical cause of loss.—*Hill v. Sturgeon*, 35 Mo. 212, 86 Am. Dec. 149.

**Sup. 1867.** In an action to recover the value of cotton delivered to a railroad company for transportation, for which a receipt was given in the nature of a bill of lading, which had stamped upon it "At owner's risk of fire," the burden of proof is on the company to show that cotton was not lost by reason of any want of care, skill, and diligence on its part.—*Levering v. Union Transp. & Ins. Co.*, 42 Mo. 88, 97 Am. Dec. 320.

**Sup. 1873.** A common carrier may, by special contract limit his liability, but cannot thereby exempt himself from the consequences of his own negligence. Breakage of goods committed to his care is a prima facie case of negligence against him, and throws upon him the burden to prove due care and vigilance.—*Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 390.

**Sup. 1875.** In suit against a common carrier for damage to a cargo of goods, plaintiff, in the first instance, is only required to prove the delivery and loss; and, if defendant pleads an exemption under his contract, the burden is upon him to prove that the loss was occasioned by the cause excepted; but defendant is not required to go further and prove affirmatively that he was guilty of no negligence. Proof of that fact will rest upon the plaintiff.—*Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199.

**Sup. 1890.** In a suit against a common carrier for breaking a marble soda-water fountain shipped "at owner's risk of breakage," the plaintiff has the burden of proving that the loss occurred through the carrier's negligence; and it is error to charge that if the fountain was received in good order, and, by the exercise of ordinary care, could have been carried and delivered in like good order, then the law presumes that the breakage was caused by the carrier's negligence.—*Witting v. St. Louis & S. F. Ry. Co.*, 14 S. W. 743, 101 Mo. 631, 10 L. R. A. 602, 20 Am. St. Rep. 636.

**Sup. 1892.** Where cotton was delivered to a railroad company for shipment, and it was agreed that the loss occurred from a cause excepted in the bill of lading, the plaintiff could only recover by showing that the fire was the result of negligence, and the burden of proof on such issue rested on him.—

*Otis Co. v. Missouri Pac. Ry. Co.*, 20 S.W. 676, 112 Mo. 622.

**Sup. 1906.** Where a railroad, in compliance with the Interstate Commerce Act, filed with the Interstate Commerce Commission a printed schedule of tariffs showing rates of freight then in force, but in a contract of shipment no rate was fixed verbally or in writing, and no allusion made to a reduced rate, the bill of lading being silent as to the rate, no presumption obtained that the shipper knew a reduced rate was charged because the printed receipt contained a clause limiting the road's liability, so as to exonerate it from liability for loss of the freight through negligence.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 94 S.W. 235, 196 Mo. 663.

**App.** Where a carrier relies on a contract of exemption, he must not only bring himself within the exemption, but show that no negligence of his contributed to the result.—(1876) *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77; (1877) *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

**App. 1877.** A common carrier may, by contract with a shipper, restrict his liability as an insurer, but since his duties as a carrier do not originate in contract, he may not, by contract with the shipper, assume the position of an ordinary bailee or of a private carrier, and if the goods are lost it is presumed that they were lost by the fault of the carrier, and in the absence of testimony to rebut such presumption, it is liable, notwithstanding a special contract.—*Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

**App. 1878.** An express company received at St. Louis a box of goods directed to the town of J., and gave a receipt stipulating that its liability should cease upon delivering the goods to another carrier at the agency of the company nearest J. The box was delivered to the other carrier at M., and never reached J. *Held*, that the burden was on the company, in an action for the loss, to show that M. was its nearest agency to J.—*Shutter v. Adams Express Co.*, 5 Mo. App. 316.

**App. 1882.** Where a person sues a common carrier in tort for a breach of its common-law liability in failing to deliver goods, and the carrier pleads a special contract containing conditions to be performed by plaintiff, the burden is on the carrier of showing the nonperformance of such conditions; but where the suit is on the special contract and not on the common-law liability, the burden

is on plaintiff to prove compliance with all the obligations which the contract imposes upon him.—*McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

**App. 1885.** Where a shipper sues the carrier on his common-law liability for negligence, as he may do, although there is a special written contract of transportation, the carrier may set up the special contract and show that the loss or injury occurred by reason of some peril excepted by the contract, in which case the burden is on the shipper to show that the carrier's negligence supervened and aided in causing the loss.—*Heil v. St. Louis, I. M. & S. Ry. Co.*, 16 Mo. App. 303.

**App. 1885.** Where goods are received in good condition, and found to be damaged when delivered, the burden of proof is upon the carrier to show that the damage arose from some excepted peril.—*Nave v. Pacific Express Co.*, 19 Mo. App. 563.

**App. 1887.** Where a carrier, sued for damages to goods sustained during shipment, claims that the goods were shipped under a special contract, excepting other risks and peril than those excepted at common law, it is for it to establish the contract and show that the loss was excepted by the contract.—*Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

Where goods are shipped under a special contract exempting the carrier from liability for damages caused by certain perils, and the goods are shown to have been injured by the perils thus excepted; the burden of proving that the carrier's negligence intervened and was the proximate cause of the loss rests on the shipper seeking to recover for the injury.—*Id.*

**App. 1891.** Where a contract of shipment provides that the goods are at owner's risk, and the shipper shows the manner in which the goods were packed and their condition when delivered to the carrier and a breakage at their destination, there is inferential evidence of negligence on the part of the carrier.—*Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424.

Where a carrier proves a special contract which places the goods at owner's risk in case of breakage, the carrier need not give evidence to show that he was not negligent, but the shipper must, in such case, give affirmative evidence of negligence.—*Id.*

**App. 1894.** Where it appears, in an action against a carrier for injury to goods shipped under a special contract exempting the carrier from liability for damages caused by certain perils, that the damage in question was caused by an excepted peril, the shipper must affirmatively show that it was caused by the carrier's negligence.—*George v. Chicago, R. I. & P. Ry. Co.*, 57 Mo. App. 358.

**App. 1902.** The burden of showing that a fire causing the loss of a shipment was due to the negligence of the carrier or its servants rests on the shipper, where the bill of lading contains a provision exempting the carrier from liability from damages caused by fire.—*Anderson v. Atchison, T. & S. F. Ry. Co.*, 67 S.W. 707, 93 Mo. App. 677.

**App. 1906.** Where a bill of lading contained a valid exception to the carrier's common-law liability, and an action was brought for damage to fruit in transit thereunder, the petition charging the delivery of the fruit in sound condition and a redelivery in a damaged condition at destination, the burden was on the carrier to show that the damage was due to a cause within the exception, whereupon plaintiff might show that the damage, though due to an excepted cause, was increased or contributed to by the carrier's negligence.—*Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25.

**App. 1906.** Where the contract of freightment in the case of an interstate shipment expresses no consideration for the agreement limiting the carrier's liability, it cannot be presumed that the claimed reduced rate was included in the schedule of rates filed with the Interstate Commerce Commission, and was duly posted, and so was the rate that the carrier could offer.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1907.** Where, in an action against an express company for loss of certain silk in transit, which was not valued, there was no proof as to how the silk was lost, nor to show the carrier's negligence, the consignee was bound by a clause in the bill of lading limiting the carrier's liability to \$50 for packages not valued.—*Norton v. Adams Express Co.*, 100 S.W. 502, 123 Mo. App. 233.

**App. 1908.** A recital, in contract to carry freight, showing consideration to be reduced freight rate, is prima facie evidence of fact and sufficient to sustain limitation of the carrier's liability for negligence.—*Mires v. St. Louis & S. F. R. Co.*, 114 S.W. 1052. See Carriers, 165 in this Digest.

**App. 1909.** A recital in a shipping contract, limiting the carrier's liability, that it has two rates for shipment, and that the rate named in the contract is a special rate and is less than the rate charged for shipments at carrier's risk, in consequence of which reduced rate the agreement limiting the carrier's liability is made, is *prima facie* evidence that the rate named is a reduced rate, and the burden of proving the contrary is on the shipper.—*Freeman v. St. Louis & S. F. R. Co.*, 122 S.W. 1, 138 Mo. App. 322.

**App. 1917.** In an action for damages to shipment of goods, defense being that the goods were shipped under the lower of two rates, relieving the carrier from liability for damages from breaking, the shipper is presumed to have knowledge of the two rates.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S.W. 1032, 196 Mo. App. 139.

**App. 1926.** Where carrier showed delay was due to a strike, shipper had duty to show carrier's negligence in connection with strike or delay.—*Mourer v. Wabash Ry. Co.*, 280 S.W. 1050.

**App. 1926.** In action against carrier for damages to goods in transit, that there was no notice of claim for damages as required by bill of lading was matter of defense.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

#### 164. — Admissibility of evidence.

**App. 1890.** Where a contract for the carriage of goods containing a stipulation limiting the carrier's liability was made with the shipper's agent at a distance from his place of business, the mere fact that the shipper had seen many bills of lading of the carrier and that such bills of lading contained similar stipulations limiting its liability would be no evidence tending to show that in making the contract through his agent at a distant place the shipper knew of and assented to the stipulations in his contract.—*Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

**App. 1906.** The contract of affreightment in the case of an interstate shipment having expressed no consideration for the agreement limiting the carrier's liability, the carrier may not show a reduced rate as a consideration, unless it shows that the claimed reduced rate was included in the schedule of rates filed with the interstate commerce commission and was duly posted, and so was a rate that the carrier could offer; there being no presumption that this was the case.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

#### 165. — Sufficiency of evidence.

**App. 1899.** In an action against a carrier for the nondelivery of goods, the answer set up a special contract, relieving defendant from liability as a carrier upon transportation on time of the goods, and making it in that event the duty of plaintiff to remove the goods from the station at the point of destination within a specified time, in default of which defendant should be entitled to store them at plaintiff's risk, and averred compliance therewith. The reply admitted the special contract, but did not admit the arrival of the goods on time, and alleged the refusal of defendant to deliver the goods upon demand therefor and tender of charges, the failure of defendant to give the customary notice of the arrival of the goods, and the failure of defendant, upon request made to it, to trace and locate the goods in a reasonable time. It was uncontradicted that the contract of carriage was performed in due time, and there was no substantial evidence that defendant failed to give reasonable notice of the arrival of the goods. *Held*, that defendant was liable only as a warehouseman upon proof of gross negligence.—*Herf & Frerichs Chemical Co. v. Lackawanna Line*, 78 Mo. App. 305.

**App. 1901.** A contract of affreightment recited that the rate was a reduced rate, expressly agreed on between the parties, that in consideration thereof the carrier should not be liable for the loss of the shipment in excess of the amount of the valuation thereof as stated in the application. *Held*, that the evidence was sufficient to show that the rate was in fact the regular one charged, and that, therefore, the limitation of liability was ineffective.—*Bowring v. Wabash Ry. Co.*, 90 Mo. App. 324.

**App. 1908.** A recital, in a contract to carry freight, showing the consideration to be a reduced freight rate, not overthrown by other competent evidence, is *prima facie* evidence of the fact and sufficient to sustain limitation of the carrier's liability for negligence.—*Mires v. St. Louis & S. F. R. Co.*, 114 S.W. 1052, 134 Mo. App. 379.

**App. 1916.** Evidence *held* to justify a finding that a carrier waived the stipulation in the contract for written notice of damage.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S.W. 794, 192 Mo. App. 188.

**App. 1916.** A recital in a contract that a reduced rate was charged in consideration of a limited valuation *prima facie* establishes that fact.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S.W. 149, 194 Mo. App. 396.

166. — Questions for jury.

**App. 1915.** Under the evidence *held* the issue which should have been submitted was not whether the notice of claim of loss, required by a contract of shipment was given, but whether its irregularity was waived.—*Equity Elevator Co. v. Union Pac. Ry. Co.*, 177 S.W. 773.

167. — Instructions.

**App. 1910.** Where, in an action against a carrier for injuries to certain monuments, the answer did not plead a contract releasing the carrier from its common-law liability, nor was there any proof that a bill of lading valuing the freight was ever called to plaintiff's attention until it was offered at the trial, or that the rate charged was other than the full tariff rate, the court did not err in refusing to limit plaintiff's recovery to the value named in the bill of lading.—*McHaney v. St. Louis & S. F. R. Co.*, 129 S.W. 1065, 149 Mo. App. 369.

168. — Verdict and findings.

*See explanation, page iii.*

(I) CONNECTING CARRIERS.

Authority of agents, see ante, 47(2).  
Carriage of live stock, see post, 219.  
Carriage of passengers, see post, 259, 270.  
Carriage of passenger's baggage, see post, 406.

Lien of connecting carrier for charges, see post, 197.

Regulations, see ante, 15.

Rights as to charges, see post, 193.

Transportation of passengers, see post, 259.

169. Who are connecting carriers.

Carriage of live stock, see post, 219.

170. Duties in general.

**App. 1910.** As a rule, in absence of contract or statute, a common carrier need only receive and transport to the end of its line and deliver to the connecting carrier with reasonable promptness, and is not under a primary duty to surrender the physical use of its instrumentalities to another carrier; such rule being based largely upon the danger which would result from permitting its instrumentalities to be controlled by another.—*Home Telephone Co. v. Granby & Neosho Telephone Co.*, 126 S.W. 773, 147 Mo. App. 216.

At common law one carrier cannot grant to a connecting carrier an exclusive privilege which is an unjust discrimination against other carriers of the same class as to facilities for exchanging business.—*Id.*

**App. 1911.** An initial carrier's obligation to carry freight beyond its line can be shown by usage or conduct.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111. See Carriers, 185(2) in this Digest.

171. Traffic arrangements between carriers.

Authority of agents, see ante, 47(2).

Instructions in action against carrier, see post, 187.

Liability for negligence, see post, 180(2).

Parties to actions, see post, 183.

**Sup. 1870.** Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs.—*Coutes v. United States Express Co.*, 45 Mo. 238.

**App. 1877.** Several carriers, for the purpose of running cars directly through from Boston and New York to St. Louis and transporting goods without change of cars over their roads, formed a transit company. The carriers, in the agreement, agreed to carry from Boston to St. Louis, and there deliver to plaintiff certain goods which the carriers had received and had given their bill of lading under the name used by the carriers as a transit company. The goods were delivered to plaintiff in a damaged condition. The bill of lading for the goods was headed: "Through freight. Blue Line Transit Co. Boston to St. Louis. Contract under joint arrangement of" three railroad companies and connecting railroads, and contained the clause, "To be transported to and delivered to the depot of the line at St. Louis." There was no evidence tending to show that any particular company transporting the goods was liable for the damage. *Held*, that any one of the companies was liable.—*Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35.

**App. 1900.** If several common carriers associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum and which the carriers divide among themselves, then they are jointly and severally liable to the shipper for a loss taking place on any part of the whole line.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

**App. 1901.** A common carrier may contract to carry beyond the end of its own line, and where several common carriers, each

having its own line, associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper, with whom they have contracted, for a loss taking place on any part of the whole line.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

**App. 1909.** The rule that, where a carrier receives property for transportation over its own line and the lines of connecting carriers for a lump freight charge, the connecting carriers are, in the absence of proof to the contrary, agents of the initial carrier applies where a traffic arrangement is proved between the initial and connecting carriers, but the rule does not apply where the initial carrier had no interest in, nor connection with, the connecting carrier, except to collect and to pay over to it the freight charge from the end of the initial carrier's line to the point of destination.—*Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co.*, 120 S.W. 663, 140 Mo. App. 130.

**App. 1910.** That connecting carriers agreed to associate themselves together, and form what to a shipper was a continuous line between the point of shipment and final destination on the line of the terminal carrier, and the contracts of carriage made with the initial carrier provided for carriage over both lines for an agreed sum for the entire trip which was prorated between them, did not make such carriers "partners" in transporting the freight; each company not having the right to manage the entire business of both between the points of shipment, and there being no division of profits and expenses.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

Such facts would not warrant a shipper as a reasonable man to deal with such carriers as copartners, where the bills of lading covering the shipment provided that the initial carrier should only be liable for negligent losses occurring on its own line, and that the connecting carrier transported the goods as agent of the shipper.—*Id.*

**App. 1912.** Carriers forming an association to carry on the business of carriage for hire *held* jointly and severally liable to a shipper for a negligent breach of a carrier's duty.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

Carriers forming an association under a distinct name for the transportation of freight for one sum divided between them *held* jointly and severally liable to a shipper for a breach of a carrier's duty though not affirmatively shown to divide losses, as well as profits.—*Id.*

**—172. Receipt of goods for transportation beyond carrier's line.**

Authority of agents, see ante, —47.

**App. 1877.** Where several carriers, having each its own line, form what to the shipper is a continuous line, a contract to carry goods through for an agreed price, which the shipper pays in one sum and which the carriers divide among themselves, makes the carriers as to the shipper liable jointly for a loss taking place on any part of the whole line.—*Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35.

**App. 1885.** Under Rev. St. 1879, § 598, providing that, when property is received by a common carrier for transportation, such carrier shall be liable for any loss or injury to such property caused by its negligence or the negligence of any other common carrier to which the property may be delivered, a carrier which received property for shipment and issued a bill of lading showing that the property was consigned to a point beyond its destination, and guaranteed a through rate of freight, both parties to the contract understanding that the goods were to be shipped to the point designated and not to the terminal point of the carrier's line, was liable for the negligence of a connecting carrier, regardless of a special receipt issued by it attempting to avoid such liability.—*Hell v. St. Louis, I. M. & S. Ry. Co.*, 16 Mo. App. 363.

**App. 1890.** A common carrier who receives goods for transportation to a point beyond its own line engages only to carry them safely, and within a reasonable time, to the end of its own line, and then deliver them to the next connecting carrier to continue or complete the transit, unless the usage of the business or of the carrier or his conduct or language shows that he takes the property as carrier for the whole route.—*Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

The fact that the initial carrier gives a through rate of freight does not take the case out of the rule that a carrier who receives goods for transportation beyond its own line engages only to carry them safely and within a reasonable time to the end of its own line



and then deliver them to the connecting carrier.—*Id.*

The statutes fixing the liability of a common carrier acting as an initial carrier applies in terms only to contracts made in the state.—*Id.*

Where a shipment was made wholly with out the state, it is immaterial that the rule that a carrier receiving goods for transportation to a point beyond its own line engages only to carry them safely and within a reasonable time to the end of its own line and then deliver them to the connecting carrier has been changed by the law of Missouri, there being no presumption that the statute law of one state exists in another state.—*Id.*

**App. 1891.** Rev. St. 1879, § 598, making a carrier receiving goods responsible for the negligence of any connecting carrier, is applicable to a shipment from a point within the state under a through bill of lading to a point without the state, although a portion of the shipment is to be performed by a connecting carrier, whose line is wholly without the state.—*Watkins v. St. Louis, I. M. & S. Ry. Co.*, 44 Mo. App. 245.

**App. 1906.** At common law a carrier, receiving goods for transportation to a point beyond its own line, engages only to carry them to the end of its line and deliver them to the connecting carrier.—*McLendon v. Wabash R. Co.*, 95 S.W. 943, 119 Mo. App. 128.

**App. 1909.** A carrier accepting goods to be forwarded over another line becomes the shipper's agent.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500, 135 Mo. App. 210.

### 173. Special contracts for through transportation.

Authority of agent, see ante, 147.

**Sup. 1872.** A shipper delivered goods to one railroad to be carried to a point on another road. In an action against the latter for loss of part of the goods, a receipt for the goods was introduced, signed by defendant's agent. The receipt was in the usual form issued by defendant. *Held* to imply an agreement by defendant to carry the goods to their destination if on defendant's line.—*Landes v. Pacific R. R.*, 50 Mo. 346.

**Sup. 1879.** A railroad company may by contract subject itself to the obligation of a common carrier beyond its own line, but such obligation must be created by contract express or implied.—*Grover & Baker Sewing*

*Mach. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, 35 Am. Rep. 444.

**App. 1877.** Railroad corporations have authority to contract for the transportation of passengers and goods beyond their own lines and beyond the limits of their respective states, such power being implied in their general corporate powers.—*Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35.

**App. 1880.** Where plaintiff made a contract with the authorized agent of defendant company for the transportation of goods from D., in Missouri, to New York, and the goods were delivered before any bill of lading was given, on the understanding that when the goods arrived at St. Louis a through bill to New York would be given, the agent of a connecting road could not, by sending a bill of lading, signed by him as agent, rescind the contract already made and partly executed, and substitute a different one with a new party to it, without the consent of plaintiffs.—*Barrett v. Indianapolis & St. L. R. Co.*, 9 Mo. App. 226.

**App. 1883.** A memorandum given by a carrier stating the receipt of goods, the name of the consignor and consignee, the destination and the rate, but which does not in terms state that the carrier undertakes for the negligence of connecting lines, and contains nothing from which such an undertaking can be inferred, is not a contract for through carriage.—*Goldsmith v. Chicago & A. R. Co.*, 12 Mo. App. 479.

A common carrier who receives goods for transportation to a point beyond his own line, in the absence of a special understanding to the contrary, engages only to carry them safely and within a reasonable time to the end of his own line, and there to deliver them to the next connecting carrier to complete the transit, and the mere fact that the carrier gives a through rate of freight for the entire route does not change the rule, as he is in such case deemed to have received the goods in the character of a carrier for his own route and of forwarding agent for the shipper for the remaining routes.—*Id.*

**App. 1894.** Under Rev. St. § 944, the acceptance by a railway of goods consigned to a point beyond its line is evidence of a contract for through shipment.—*Hance v. Wabash Western Ry. Co.*, 56 Mo. App. 476.

**App. 1897.** A railroad company cannot be compelled to transport freight beyond its own line, but it may contract to do so, and

where it so contracts it assumes all the obligations of a carrier for the whole route over the connecting lines as well as its own.—*Eckles v. Missouri Pac. Ry. Co.*, 72 Mo. App. 296.

**App. 1900.** A connecting carrier was sued for conversion for refusal to deliver horses received by it from another carrier because plaintiff refused to pay its charges. The charges had been paid to the first carrier, but defendant did not know that fact. *Held*, that a subsequent acceptance of the charges from the first carrier did not estop defendant from denying the authority of the first carrier to bind it by a contract of carriage in the suit for conversion.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 580.

Incorporated railway carriers have authority to contract for the carriage of persons and property beyond their own lines and beyond the limits of their respective states, and a carrier entering into such a contract incurs the liability that would attach to it had it contracted solely to carry over its own line.—*Id.*

**App. 1906.** The receipt of freight and the issuance of a bill of lading to a destination beyond the receiving carrier's line is prima facie an agreement to carry to that point, though there is no express stipulation to transport to it.—*Lee v. Wabash R. Co.*, 94 S.W. 991, 118 Mo. App. 476.

**App. 1906.** The G. Company, a common carrier, received goods of plaintiff for transportation to L., a point beyond its own line, received the full amount of charges for through transportation, and issued a bill of lading naming L. as the destination, which, though stipulating that "the responsibility of each carrier is to cease at the station where said freight leaves its line, when the property is to be delivered to connecting road or carriers," mentioned no other carrier as a party to the contract, and did not provide that G. would carry the property only to the end of its own line. *Held*, that the contract was one by G. alone to carry the property to its destination, and that it and the M. Company, which, as agent of G., received the goods at the end of G.'s line for carriage to L., were not joint contractors.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1907.** Where a common carrier contracts to transport goods beyond the terminus of its own lines, the connecting carriers employed in furthering and completing such transportation become agents of the initial carrier, who is responsible for their de-

faults to the owner of the goods.—*Cohen v. Missouri, K. & T. Ry. Co.*, 102 S.W. 1029, 126 Mo. App. 244.

**App. 1907.** A bill of lading issued by the initial carrier, which collects the charges for the entire distance, reciting neither the point where the freight is received nor its destination, nor that such carrier agrees to carry only to the end of its own line, and which, while attempting to restrict its liability by providing that it shall be liable only for losses occurring while the property is in its actual custody and on its road, provides that its responsibility as a carrier terminates on arrival of the goods at the place of delivery, and which states that the property is consigned to the shipper with a direction to notify H. at Y., the point of destination, is a contract for through carriage, making the initial carrier liable for loss of the property by fire, while in the possession of the connecting carrier, in the absence of a valid provision to the contrary.—*Scott County Milling Co. v. St. Louis, I. M. & S. R. Co.*, 104 S.W. 924, 127 Mo. App. 80.

**App. 1909.** The lines of the M. & O. Company extended south from East St. Louis and connected with another line which extended to New Orleans. A carrier in St. Louis received goods to be shipped south over the other lines, transferred them across the river by ferry, and delivered them to a terminal association line in East St. Louis which transferred them to the M. & O. Company for shipment. The carrier in St. Louis received a certain sum for transferring cars, which was divided with the terminal association, and gave the shipper a receipt, which it surrendered in East St. Louis for a bill of lading from the M. & O. Company covering the entire route to New Orleans. *Held*, that the St. Louis carrier and the terminal association were not joint promisors with the M. & O. Company for the carriage of the goods over the entire route, and, if the receipt received from the St. Louis carrier could be regarded as a bill of lading for through carriage, the agreement was relinquished by receiving as a substitute the bill of lading from the M. & O. Company.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

A bill of lading recited that the property was received at St. Louis by the M. & O. Company to be transported by that "company to ———." The destination was left blank in the body of the receipt, but at the foot were the words "consigned to T. J. Shea, New Orleans, La.," and still farther below, under

the heading "List of articles," was the notation "c/o N. O. & N. E., F. W. Birchett." The contract recited, among its printed conditions, that the receiving company agreed to carry the property to destination, if on its road, and, if not on its road, and the company guaranteed through carriage, then it agreed to deliver to such other carrier as the company might select, and did not agree to carry beyond its own line, or be responsible beyond, under any circumstances. At the foot of the bill of lading, and after the signatures, it was declared that the fact that the property was marked beyond the company's line would not be understood as an agreement to carry beyond. *Held*, that the bill of lading was for a through shipment to New Orleans.—*Id.*

**App. 1911.** At common law an initial carrier's liability for safe and reasonably prompt carriage of freight ends with its line and use of ordinary care in delivering to the connecting carrier, but the liability may be extended beyond the line by special contract.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

A shipper suing on a contract for through shipment can recover for a connecting carrier's failure to comply with a routing direction preventing a diversion of the shipment as a negligent breach of defendant's contract obligation.—*Id.*

**App. 1912.** A shipper may enforce the common-law liability of an insurer against the initial carrier alone, provided the shipment is a through one, and the contract of shipment so stipulates.—*Bockserman v. St. Louis & H. Ry. Co.*, 152 S.W. 389, 169 Mo. App. 168.

**App. 1915.** While a common carrier cannot be compelled to contract to carry goods beyond its own line, yet it may do so either by express contract or implication.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

A defendant *held* to have made a through contract of carriage and transportation of goods beyond its own line.—*Id.*

**App. 1916.** An interpretation of contracts for shipment over connecting lines, as being for through shipment, making the initial carrier liable for damages wherever occurring, is favored.—*Keithley & Quinn v. Lusk*, 189 S.W. 621, 195 Mo. App. 143.

The parties contemplating a through shipment, part over a connecting line, at a through rate, the initial carrier does not destroy its through character by issuing a bill

of lading over its own line only, and itself reconsigning the goods to the connecting carrier.—*Id.*

174. **Delivery to succeeding carrier.**

**Sup. 1870.** In a suit against an express company for goods lost in transit beyond its line of conveyance the evidence showed no payment for the whole route, and no understanding, usage, or agreement that the company assumed to be responsible for the goods after they left its own line. *Held*, that it was only bound under its contract or undertaking to transport them safely to the point on its line nearest the place of destination and then to deliver them to the proper carrier to be forwarded, and that, having done this, it was not responsible for the subsequent loss.—*Coates v. United States Express Co.*, 45 Mo. 238.

**Sup. 1874.** A carrier who receives goods as a carrier, and not as a forwarder, and forwards them to their destination from the end of his line, in the exercise of a sound discretion, cannot be held responsible as common carrier for any subsequent loss, although it failed to give notice of its action to the owner or consignor.—*Cramer v. American Merchants' Union Express Co.*, 56 Mo. 524.

**Sup. 1895.** A shipper of goods has the right to designate over what connecting lines his goods shall be shipped, and the first carrier is bound to obey the directions of the shipper in this respect, and if he disobeys them he is liable as for a conversion.—*Wiggins Ferry Co. v. Chicago & A. R. Co.*, 27 S.W. 568, 128 Mo. 224, opinion adopted by court in banc 30 S.W. 430, 128 Mo. 224.

**App. 1881.** In an action for damages resulting to plaintiff by reason of defendant's failure to deliver to the next carrier for shipment beyond defendant's route, where it was shown that defendant tendered the goods to the connecting line and that it refused to receive them under the rule then in force, plaintiff was entitled to show that the rule under which the connecting carrier refused was revoked six days after the offer, and that defendant knew such revocation and that it did not again offer to deliver the goods to such carrier.—*Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134.

Where goods have passed wholly out of sight of both the consignor and consignee, if from any circumstances delivery to the succeeding carrier becomes impossible, the former carrier is under an obvious duty to notify

either the consignor or the consignee unless it is impracticable to do so.—*Id.*

**App. 1883.** A common carrier who undertakes for himself to perform an entire service has no authority to constitute another person the agent of the consignor or consignee. He may employ an agency, but it must be subordinate to him, and its acts are considered as done in his service and as his.—*Fischer v. Merchants' Dispatch Transp. Co.*, 13 Mo. App. 133.

**App. 1883.** Failure to give notice to consignor of facts known to him as to refusal of an intermediate carrier to receive goods. See *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 576, memorandum.

**App. 1883.** A carrier, receiving goods imported from a foreign country as a forwarder, is bound to exercise the professional business knowledge and skill usually exercised by good undertakers in that particular profession or business, and where the carrier on receiving bonded goods for transportation to an inland city delivered them for transportation to an unbonded vessel, it was liable for the damages resulting to the salability of the goods.—*Mellier v. St. Louis & N. O. Transp. Co.*, 14 Mo. App. 281.

**App. 1885.** If goods are delivered to a carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be by it delivered to a connecting carrier, in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line, or succession of carriers, the first and each succeeding carrier becomes the agent of the owner of the goods to make delivery to the next carrier.—*Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103.

**App. 1889.** The fact that a shipper and the initial carrier contracted that the goods should be shipped over the lines of a designated connecting carrier does not authorize the connecting carrier to sue on such contract for a breach thereof by the initial carrier arising out of the fact that the initial carrier shipped the goods over the line of another connecting carrier.—*St. Louis & T. R. Packet Co. v. Missouri Pac. Ry. Co.*, 35 Mo. App. 272.

**App. 1892.** From the receipt of goods by a carrier the law will only imply a contract of carriage to the end of the receiving company's road, and if further transportation is necessary, that the shipment will be safely

and promptly delivered to a connecting carrier, if there is one.—*Patterson v. Kansas City, Ft. S. & M. R. Co.*, 47 Mo. App. 570.

**App. 1895.** The delivery of a shipment of grain by a railroad company to a connecting carrier other than the one designated by the shipper is a breach of contract for which the shipper is entitled to recover nominal damages, although the shipment arrives in due time and in good condition and is accepted.—*H. W. Chandler Commission Co. v. Nashville, C. & St. L. Ry. Co.*, 64 Mo. App. 144.

**App. 1904.** A carrier of freight which owned no line of railway but made shipments in its cars over other lines, received goods for shipment under a bill of lading in which the destination was marked "St. Joseph, Mo.," and in the body of which appeared the words, "Two (2) cases clothing % M. P. R. R.," and also a statement that the goods were "marked, consigned and destined, as indicated below, to be carried over the line to said destination, or to be delivered to another carrier on the route to said destination." *Held* that, conceding that the contract bound the carrier only to deliver the goods to the M. P. railroad, and not to St. Joseph, its responsibility did not cease until it made delivery to that road, and a transportation company, to which it delivered the goods to be delivered by it to the M. P. railroad was its agent, for the default of which it was liable.—*James S. Davis (Clothing Co. v. Merchants' Dispatch Transp. Co.)*, 81 S.W. 226, 106 Mo. App. 487.

A further statement in the margin of the bill of lading: "It is mutually agreed that the rate of freight from [the point of shipment] to [the point of delivery to the transportation company] is to be, if first class goods, 87 cts. per 100 lbs.," did not restrict or qualify the obligation to deliver at least to the M. P. railroad.—*Id.*

**App. 1905.** Where a carrier agreed to transport freight to a point beyond its own line by means of a certain designated connecting carrier, delivery to a different connecting carrier was a breach of the contract.—*Eckles v. Missouri Pac. Ry. Co.*, 87 S.W. 99, 112 Mo. App. 240.

**App. 1906.** Proof that cars containing plaintiff's property were placed on defendant railroad's connecting track, the usual place of delivery of freight destined for it as connecting carrier, under an arrangement with other roads that freight so placed would be accepted for further transportation, did not amount to an acceptance until defendant took

actual charge of the property, accepted the bill of lading, or performed some other acts amounting in law to an acceptance.—*Gray v. Wabash R. Co.*, 95 S.W. 983, 119 Mo. App. 144.

**App. 1900.** A carrier delivering freight to its connecting carrier has complied with its contract, and it owes no further duty as carrier or otherwise.—*Kirk v. Lehigh Valley Transp. Co.*, 115 S.W. 515, 135 Mo. App. 99.

**App. 1911.** An initial carrier of freight destined beyond its line undertaking only to transport to the point most convenient to the destination reached by its line performs its duty by delivering to the connecting carrier.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

### 175. Delivery to consignee.

**Sup. 1887.** On the arrival of goods at their destination, where they were carried by connecting carriers under a through bill of lading, the consignee was notified, and the goods were then delivered by a transfer company, acting at the request of the consignee. *Held*, that the transfer company was not, as a connecting carrier, liable to the shipper for the conversion of the goods by delivery to the consignee, who, under the bill of lading, was not entitled to them until they were paid for.—*Nanson v. Jacob*, 6 S.W. 246, 93 Mo. 331, 3 Am. St. Rep. 531.

**Sup. 1903.** Grain was delivered to a carrier for shipment to a destination beyond its own line, under a through bill of lading. A sight draft, with the bill of lading attached, was forwarded, through certain banks for collection from the consignee, who refused to accept the same because of the nonarrival of the grain. The draft was protested and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond, without presentation of the bill of lading, and without payment of the draft. *Held*, that such delivery constituted a conversion of the grain by the connecting carrier.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.*, 75 S.W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

**Sup. 1922.** Where a terminal carrier at the request of consignee reconsigned interstate shipment of goods by changing the way bills, though it did not issue any new bills of lading, *held* to constitute a delivery to the consignee, and, if unauthorized by consignor, the terminal carrier was liable for conversion.—*Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88.

**App. 1910.** Where the cause of misdelivery of goods by a connecting carrier was a mistake of the initial carrier in notifying the connecting carrier as to the name of the consignee, the initial carrier is liable for the loss.—*Central American S. S. Co. v. Mobile & O. R. Co.*, 128 S.W. 822, 144 Mo. App. 43.

Where a bill of lading authorizes the delivery of goods to the consignee without its production, misdelivery by the connecting carrier to the party named as consignee by the initial carrier without the production of the bill of lading does not avoid the liability of the initial carrier to the consignor.—*Id.*

Though the fault which caused the misdelivery of goods by a connecting carrier was wholly that of the initial carrier, they are liable to the consignor jointly; their relation being in the nature of a partnership.—*Id.*

That both the initial and connecting carriers are sued, where the fault, is solely that of the initial carrier, does not relieve the connecting carrier of liability.—*Id.*

**App. 1916.** Carrier *held* liable to shipper for damages caused by connecting carrier's failure to deliver shipments at station of destination, resulting in consignees' refusal to accept.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S.W. 131.

**App. 1925.** Terminal carrier bound by initial carrier's knowledge of appearance of shipment when received for transportation.—*Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co.*, 273 S.W. 424, 221 Mo. App. 338.

**App. 1926.** Carrier, being instructed not to deliver eggs to consignee named, was required to follow instructions and rendered itself liable to plaintiff in failing to do so (Bill of Lading Act [49 USCA §§ 89, 90, 93]).—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

### 176. Delay in transportation or delivery.

Actions for delay, see post, 181¼, 185.

**App. 1899.** A shipper delivered goods to a carrier consigned to East St. Louis to shipper's order. A bill of lading was issued by the initial carrier which provided that it should not be responsible as a common carrier for the property beyond its line of road. The initial carrier delivered the goods to a connecting carrier. The waybill was also delivered to the connecting carrier. The waybill did not clearly state the address of the consignee, but the consignee had been en-

gaged in the commission business for many years, and as such had shipped many hundred car loads of commodities over the connecting carrier's line, and also had various other transactions with the freight department of the connecting carrier. *Held*, that a verdict finding the connecting carrier guilty of negligence for failure to deliver the property in time was supported by the evidence.—*Hall v. Wabash R. Co.*, 80 Mo. App. 463.

**App. 1907.** Where defendant railroad agreed with plaintiff, the consignee of freight, that in consideration of a certain sum paid by plaintiff it would deliver the cars, which were then on its "hold" track, over the tracks of other railroads to plaintiff's place of business, it continued to sustain the relation of common carrier to plaintiff, and was responsible for loss resulting from failure to promptly deliver the cars.—*Cohen v. Missouri, K. & T. Ry. Co.*, 102 S.W. 1029, 126 Mo. App. 244.

Where defendant railroad agreed with plaintiff, the consignee of freight, that without extra charge it would send certain cars consigned to plaintiff, and which had not arrived, to his place of business over the roads of connecting carriers, instead of sending them directly to defendant's "hold" tracks, defendant continued to sustain the relation of common carrier to plaintiff, and was liable for loss resulting from failure to promptly deliver the cars, although such failure was caused by the refusal of connecting carriers to receive the cars.—*Id.*

#### 177. Loss of or injury to goods.

Actions for loss or injury, see post, 181½, 185.

##### 177 (1). Liability in general.

**Sup. 1923.** Carmack Amendment to Interstate Commerce Act, requiring the initial carrier to issue a bill of lading to destination and making it liable to the shipper or holder of the bill of lading for loss of, or injury to, the shipment, and providing that it should not deprive the holder of any remedy or right he had under existing law, did not change the liability of any carrier for its own negligence in handling shipments over its own line, but its evident purpose was to do away with the necessity of the holder making an investigation to determine which carrier was at fault.—*State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 298 Mo. 474, certiorari granted *State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 44 S. Ct. 132, 263 U. S. 600, 68 L. Ed. 511, and judg-

ment affirmed (1924) 45 S. Ct. 47, 266 U. S. 200, 69 L. Ed. 247, 40 A. L. R. 1232.

**App. 1908.** To make a case against an initial or intermediate carrier on its common-law liability, the owner must prove that the damage happened while the property was in such carrier's custody.—*Connelly v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 810.

**App. 1909.** A carrier delivering freight to its connecting carrier has complied with its contract, and it owes no further duty as carrier or otherwise.—*Kirk v. Lehigh Valley Transp. Co.*, 115 S.W. 515. See Carriers, 174 in this Digest.

**App. 1910.** Where, by principal contracting clause in bill of lading, initial carrier issuing it agreed to carry from point on its own line through to destination at point on connecting line, such carrier was liable for negligent losses occurring on connecting line though subsequent clause provided it should deliver to connecting carrier, when its liability should cease.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243. See Carriers, 180(2) in this Digest.

**App. 1913.** A shipper suing the initial and connecting carriers for injuries to freight may only recover against one carrier.—*Connelly v. Illinois Cent. R. Co.*, 153 S.W. 79, 169 Mo. App. 272.

**App. 1925.** Connecting carrier *held* not liable for damage to nursery stock by freezing, not due to its delay.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

##### 177 (2). Effect of agreements between connecting lines and joint liability.

**App. 1910.** Where freight shipped over two roads was forwarded over a bridge belonging to a bridge company which connected the line of the final carrier at a river, under an arrangement between it and the bridge company, the latter, though liable to the shipper for its torts in transporting the freight, was the agent of the final carrier, so as to make it liable for the bridge company's negligence in transporting.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

Though several carriers are not copartners in transporting freight, if one of them is authorized by the others to make transportation contracts for all of them, each will be liable for the negligence of the others in transporting.—*Id.*

In absence of statute, a final carrier having a joint traffic agreement with the initial carrier will not be liable for the latter's negligence in transporting freight thereunder, unless there was a copartnership agreement or joint undertaking by which it agreed to carry the freight over the whole route.—Id.

Under an agreement by the final carrier to transport from the junction to final destination on its line, it would only be liable for negligent losses occurring on its own line.—Id.

One of defendant railroad companies received freight for transportation to a point on the line of the other road under a joint traffic agreement by which the freight charge was prorated between them; the initial carrier having authority to issue through bills of lading to the point of destination. By the bills of lading of two of the shipments the initial company agreed to transport the property to final destination over its own line, and that of the connecting carrier provided that it should only be liable for damage occurring on its own line while the freight was in its actual custody, and the bill of lading for the other shipments provided that the initial company should transport the freight to the end of its line for delivery to the connecting carrier, and that, in continuing the shipment, the latter was the agent of the shipper and not of the initial carrier, and the latter should be liable only for damage occurring on its own line. *Held*, in view of the provisions of the bill of lading, that there was no joint undertaking or partnership between the carriers for transporting the goods so as to impose a joint and several liability on each carrier for the whole route.—Id.

**App. 1911.** Carriers on connecting routes forming associations and traffic arrangements to carry freight through the whole line are partners, and each is liable for any loss or injury happening on any part of the route.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 134 S.W. 665, 154 Mo. App. 420, opinion adopted (1912) 144 S.W. 1199, 164 Mo. App. 444.

A carrier may contract to carry beyond its own line, and where several carriers form a continuous line and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper for a loss taking place on any part of the line.—Id.

Under the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386,

amended by Act Cong. June 29, 1906, c. 3591, 34 Stat. 595), making the initial carrier of an interstate shipment liable for any loss or injury caused by any carrier, the initial carrier of an interstate shipment is liable for damages occurring on the connecting carrier's line, and any damages occurring to the shipment by the negligence of the connecting carrier may be recovered from the initial and connecting carriers jointly; but the connecting carrier is not liable for any injury occurring on the line of the initial carrier.—Id.

**App. 1912.** That freight when delivered to a connecting carrier was damaged, and was still further damaged while in its possession, does not show concurrent negligence of both carriers, warranting joint judgment against them.—*Walker v. St. Louis & S. F. R. Co.*, 142 S.W. 729, 162 Mo. App. 374.

#### 177 (3). Liability of initial carrier.

**Sup. 1890.** When a carrier receives a parcel to be transported to a place beyond the terminus of its route, it is held liable, under Rev. St. 1879, § 598, as such carrier to the place of destination, in the absence of a specific contract to carry such parcel only to the terminus of its own route or limiting the liability to a loss or damage occurring on its own route.—*Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 15 S.W. 761, 103 Mo. 433.

**Sup. 1894.** Where a railroad company contracts to transport goods beyond the end of its line, it assumes all the duties of a carrier over the connecting line.—*Davis v. Jacksonville Southeastern Line*, 28 S.W. 965, 126 Mo. 69.

**Sup. 1897.** Comp. St. Neb. 1893, c. 16, § 111, providing that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers," and that "whenever two or more railroads are connected together, the company owning either of said roads receiving freight to be transported to any place on the line of either \* \* \* shall be liable as common carrier for the delivery of the freight to the consignee \* \* \* in the same order in which such freight was shipped," does not render a receiving company, which has only contracted to deliver to the connecting carrier, liable for the latter's default.—*Miller Grain & Elevator Co. v. Union Pac. Ry. Co.*, 40 S.W. 894, 138 Mo. 658.

**Sup. 1923.** Liability for loss occasioned by the carelessness and negligence and in violation of the common-law duty of a com-

mon carrier is within Carmack Amendment, making the initial carrier liable to the holder of the bill of lading for all loss regardless of the line on which the loss occurred.—*State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 298 Mo. 474, certiorari granted *State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 44 S. Ct. 132, 263 U. S. 696, 68 L. Ed. 511, and judgment affirmed (1924) 45 S. Ct. 47, 266 U. S. 200, 69 L. Ed. 247, 31 A. L. R. 1232.

**App. 1880.** Under the rule generally adopted in this country a carrier who receives goods marked to a particular destination beyond the end of its road is bound to transport and deliver them to the next carrier on the route according to the usage of its business, but is not liable for losses beyond its line in the absence of special contract—*McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

**App. 1881.** Liability of carrier for loss of goods by connecting carrier. See *Freeburg Coal Co. v. Union Ry. & Transit Co.*, 10 Mo. App. 597, memorandum.

**App. 1886.** In order to hold the receiving carrier for loss of goods by the connecting carrier, the authority of the agent of the receiving company to make a contract of transportation beyond its own line must be shown.—*Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333.

**App. 1899.** Where a carrier of apples refused permission to the shipper to place a stove in the car and send a man with the shipment to protect it from freezing, and the apples were frozen after delivery to a succeeding carrier by whom they were received in good order, the negligence of the succeeding carrier was not the proximate and sole cause of the damage, so as to exempt the first carrier from liability.—*Popham v. Barnard*, 77 Mo. App. 619.

**App. 1905.** Where a carrier receives goods for transportation to a destination beyond the end of its line, its common-law liability terminates with the delivery of the property to the succeeding carrier for further transportation, unless it binds itself by an express or implied contract for the whole distance.—*Hubbard v. Mobile & O. Ry. Co.*, 87 S. W. 52, 112 Mo. App. 459.

**App. 1905.** Where a carrier is paid full freight for carriage to a destination beyond the termination of the carrier's line, the contract is to carry the goods through to their destination, and the first carrier is responsi-

ble for the delivery of the goods.—*Eckles v. Missouri Pac. Ry. Co.*, 87 S.W. 99, 112 Mo. App. 240.

**App. 1906.** Where, after the shipment of certain apples, the original destination was changed under an agreement between plaintiff and the initial carrier at the point of shipment requiring transportation over another road, the initial carrier remained liable for proper care of the apples until they reached their final destination though plaintiff communicated with the agent of the connecting carrier merely for the purpose of expediting the transit.—*Hurst v. St. Louis & S. F. R. Co.*, 94 S.W. 794, 117 Mo. App. 25.

Where, during the transportation of apples, the destination was changed by agreement with the initial carrier according to custom, so as to require transportation over the line of a connecting carrier, such diversion amounted to a mere extension of the original contract, rendering the initial carrier responsible for negligent injury to the fruit, either by its own employees or those of the connecting carrier, under Rev. St. 1899, § 5222, providing that a common carrier shall be liable for injury to property caused by its negligence or that of any other common carrier to which the property may be delivered for transportation.—*Id.*

Where, during the transit, the destination of certain apples was changed by agreement with the initial carrier so as to require transportation over a connecting line, and the apples were injured in transit, an instruction that, unless the jury believed that the ventilators of the car were carelessly and negligently closed or permitted to remain closed during transportation from the point of shipment to the point of diversion, the initial carrier was not liable, was erroneous for failure to predicate such carrier's nonliability for the negligence of the connecting carrier on a finding that such initial carrier had not agreed to carry the apples to their ultimate destination.—*Id.*

**App. 1907.** Under Rev. St. 1899, § 5222 [Ann. St. 1906, p. 2718], providing that when a carrier receives property to be transferred from one place to another, within or without the state, and issues receipts or bills of lading in the state, it shall be liable for any loss caused by its negligence or the negligence of any connecting carrier, the receipt of goods by a carrier to be transported to a place beyond its own line, in the absence of a stipulation limiting the initial carrier's liability to



loss or damage occurring on its own route, creates a liability for any loss or damage on the route of the connecting carriers.—*Marshall Medicine Co. v. Chicago & A. R. Co.*, 104 S.W. 478, 126 Mo. App. 455.

**App. 1907.** Rev. St. 1899, § 5222 [Ann. St. 1906, p. 2718], providing that when property is received by a carrier for transportation, or when a carrier issues a bill of lading, it shall be liable for loss of the property caused by its negligence or that of another carrier to which the property is delivered or over whose line it may pass, has no application to a case where property while in the possession of a connecting carrier is destroyed by fire, without negligence of either carrier.—*Scott County Milling Co. v. St. Louis, I. M. & S. R. Co.*, 104 S.W. 924, 127 Mo. App. 80.

**App. 1908.** Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that, when shipments begin in Missouri, the initial carrier shall be liable for damages accruing anywhere on the route, does not apply to transportation of goods wholly without the state.—*Connolly v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 310.

**App. 1909.** Carrier undertaking to transport goods and forward them, is liable as insurer for loss resulting from unnecessary breach of duty or deviation from forwarding instructions.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500. See Carriers, 178 in this Digest.

**App. 1909.** Where an initial carrier contracted for a through shipment, it would be liable as an insurer for breakage anywhere on the route, whether from negligence or not, unless there was a consideration for the restriction of its common-law liability, and it would be liable for negligent breakage whatever rate was charged.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 13, 137 Mo. App. 133.

**App. 1909.** A carrier issuing a through bill of lading, by which it agrees to transport freight part of the distance by a ship and the balance by rail, becomes thereby a carrier for the entire route, and is liable for the negligence of any carrier transporting the property under an arrangement with it.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 122 S.W. 362, 143 Mo. App. 42.

**App.** A domestic law making an initial carrier liable for negligence of connecting carriers does not apply to a contract of shipment made in another state.—(1911) *Lord & Bush-*

*nell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175; (1912) *Walker v. St. Louis & S. F. R. Co.*, 142 S.W. 729, 162 Mo. App. 374.

**App. 1912.** Under the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, amended by Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595), making initial carrier liable for injury caused by a connecting carrier, an initial carrier *held* liable for any injury occurring on the line of the connecting carrier, though the connecting carrier is not liable for injury on the line of the initial carrier.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 1199, 164 Mo. App. 444, adopting opinion (1911) 134 S.W. 665, 154 Mo. App. 420.

**App. 1912.** Under the statute, a shipper may enforce liability against the initial carrier for the negligence of the connecting carrier.—*Bockserman v. St. Louis & H. Ry. Co.*, 152 S.W. 389, 169 Mo. App. 168.

**App. 1914.** Where transportation was divided into two separate and independent stages, and the initial bill of lading imposed no duty to deliver the car to the connecting carrier for further transportation, the initial carrier's responsibility ended on its delivery in good order to the consignor's agent at the connection point.—*Smith v. Gulf, C. & S. F. Ry. Co.*, 164 S.W. 132, 177 Mo. App. 269.

**App. 1915.** A carrier which uses another in making a through shipment is liable for the negligence of the connecting carrier.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

Though no bill of lading for a through shipment was issued, the Carmack Amendment does not free the initial carrier from liability.—*Id.*

**App. 1916.** Under the Carmack Amendment to the Hepburn Act, making the initial carrier liable to the holder of the bill of lading for loss of property, such liability extends to a misdelivery of the property by the final carrier.—*Kemper Mill Co. v. Missouri Pac. Ry. Co.*, 186 S.W. 8, 193 Mo. App. 468, transferred from Supreme Court *Kemper Mill & Elevator Co. v. Same* (1915) 178 S.W. 502.

**App. 1916.** The common-law rule of liability of a carrier for goods shipped was not changed by the Carmack Amendment, the purpose of which was to make the first carrier liable as at common law.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S.W. 149, 193 Mo. App. 572.

**App. 1916.** Defendant undertaking in the first instance to carry only to J., the end of its line, and afterwards at J. undertaking to carry to another point, in the same state, over the line of another, is liable for the negligence of the other as its agent.—*Keithley & Quinn v. Lusk*, 189 S.W. 621, 195 Mo. App. 143.

**App. 1916.** Carrier of goods received for through transportation becomes responsible for the destruction of the goods while in custody of delivering carrier, in transit under terms of contract.—*Wilson v. Chicago Great Western R. Co.*, 190 S.W. 22.

**App. 1917.** Unauthorized delivery of car to shipper by terminal carrier without surrender of bill of lading under Interstate Commerce Act rendered initial carrier liable, either in tort for conversion of car or for breach of contract of carriage.—*Peycke Bros. Commission Co. v. Sandstone Co-Op. Co.*, 191 S.W. 1088, 195 Mo. App. 417.

**App. 1917.** Under Carmack Amendment to Interstate Commerce Act, initial carrier is liable for all damages for through shipment, although all or a part of the damage accrued by reason of negligence of terminal carrier.—*O'Briant v. Pryor*, 195 S.W. 759.

**App. 1918.** Whether the receiving carrier took as initial carrier or as agent for another carrier it is not liable for the loss of goods burned at the point of loading, where it had turned over whatever control it had to the next carrier before the fire.—*Central Nat. Bank v. Pryor*, 207 S.W. 298.

**App. 1925.** Shipment *held* not continuous interstate shipment, and carrier *held* initial carrier.—*Forest Green Farmers' Elevator Co. v. Davis*, 270 S.W. 394, 216 Mo. App. 545.

**App. 1925.** Carrier *held* liable for injury to shipment whether caused by its negligence or some other carrier.—*Marshall Land & Mercantile Co. v. Missouri Pac. R. Co.*, 270 S.W. 422.

**App. 1925.** Liability of initial carrier for damage to interstate shipment subject to Carmack Amendment.—*Mount Arbor Nurseries v. New York, C. & St. L. R. Co.*, 273 S.W. 410, 217 Mo. App. 31.

**App. 1926.** Under the Cummins Amendment (49 USCA § 20), the initial carrier is liable as matter of law for damages occurring on connecting lines.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

**App. 1926.** Carmack Amendment to Interstate Commerce Act (49 USCA § 20 (11, 12), does not change common-law rule of liability of carrier for loss or damage of freight.—*Griggs v. St. Louis & H. R. Co.*, 285 S.W. 159.

—177 (4). **Liability of intermediate or last carrier.**

**App. 1909.** A contract with a final carrier for a through shipment of freight is terminated on the shipper ordering the connecting carrier to return the freight, and the liability of the contracting carrier terminated, except its liability to return the freight charges paid in advance.—*Kirk v. Lehigh Valley Transp. Co.*, 115 S.W. 515, 135 Mo. App. 99.

**App. 1916.** Nothing in Carmack Amendment to Interstate Commerce Act abrogates right of shipper under existing federal laws to pursue connecting carrier whose wrong caused the loss, so that shipper could sue an intermediate carrier for its negligent breach of contract.—*Collier v. Wabash R. Co.*, 190 S.W. 969.

**App. 1923.** The Carmack Amendment to the Interstate Commerce Act does not confine a shipper's remedy for the loss or destruction of a shipment of goods to the initial carrier.—*Ietner v. Missouri Pac. R. Co.*, 249 S.W. 155, 215 Mo. App. 448.

**App. 1924.** Carmack Amendment to the Interstate Commerce Act *held* not to abolish cause of action against the last delivering carrier for damage or destruction of goods; such amendment merely creating new liability and right against the initial carrier.—*American Fruit Growers v. Cleveland, C. C. & St. L. Ry. Co.*, 263 S.W. 488.

**App. 1926.** Under the Cummins Amendment (49 USCA § 20), the common-law liability of the terminal carrier for loss on its line remains in full force.—*Amber v. Davis*, 282 S.W. 459, 221 Mo. App. 448.

—178. **Carrier as forwarder or warehouseman.**

**App. 1891.** So long as a carrier holds goods for delivery to a connecting carrier, it holds them for transportation and not for delivery, and is liable as a carrier for their loss, although the connecting carrier unreasonably delays in receiving them, unless by warehousing them or otherwise it does some unequivocal act indicative of a purpose to change its office from that of a carrier to that of a warehouseman.—*Bennitt v. Missouri Pac. Ry. Co.*, 46 Mo. App. 656.

**App. 1907.** Where a carrier holds goods for delivery to succeeding carriers, he holds them as a carrier, and not as an ordinary bailee or mere forwarder, and, although the connecting carrier refuses or unreasonably delays to receive them, the relation of common carrier continues until the carrier by warehousing the goods or some other unequivocal act indicates its purpose to change its relation from that of carrier for transportation to that of a mere custodian for safekeeping or forwarding.—*Cohen v. Missouri, K. & T. Ry. Co.*, 102 S.W. 1029, 126 Mo. App. 244.

**App. 1909.** A carrier undertaking to transport goods over its own line, and then forward them over another, is liable as insurer for loss or damage resulting from any unnecessary breach of duty or deviation from forwarding instructions.—*Weaver v. Southern Ry. Co.*, 115 S.W. 500, 135 Mo. App. 210.

**App. 1909.** The liability of an initial carrier, who had delivered a shipment to its connecting carrier, and subsequently under agreement with the shipper received and returned the freight to him, for which the shipper paid nothing, for injury to the goods while so in its charge, was merely that of a bailee without hire.—*Kirk v. Lehigh Valley Transp. Co.*, 115 S.W. 515, 135 Mo. App. 99.

179. **Transportation of cars or other vehicles of other carrier.**

*See explanation, page iii.*

180. **Limitation of liability.**

Carriage of live stock, see post, 218.

180 (1). **In general.**

**Sup. 1928.** Bill of lading for transportation of cotton to England held "through bill of lading," and shipment not within statutes prohibiting exemptions from liability (Interstate Commerce Act, § 20, as amended by Carmack Amendment and Cummins Amendments [49 USCA § 20]).—*Lesser-Goldman Cotton Co. v. Missouri Pac. R. Co.*, 12 S.W.(2d) 485, certiorari denied (1929) 49 S. Ct. 351, 279 U. S. 855, 73 L. Ed. 997.

Tender and acceptance of cotton for transportation to England was transaction outside statutes prohibiting exemption from liability for loss or injury (Interstate Commerce Act, § 20, as amended by Carmack Amendment and Cummins Amendments [49 USCA § 20]).—*Id.*

**App. 1884.** A stipulation of the back of a bill of lading, that for all damages occurring

in the transit of "said packages" the legal remedy shall be against the particular carrier only in whose custody the packages may actually be at the time of the happening thereof, is not a sufficient waiver by the shipper of the provisions of the statute imposing on railroads a liability for the negligence of connecting roads, where the property shipped, instead of being packages, was corn in bulk.—*Rosenstein v. Missouri Pac. Ry. Co.*, 16 Mo. App. 225.

**App. 1885.** Rev. St. 1879, c. 14, § 598, provides that, whenever any property is received by a common carrier for transportation, the carrier issuing the bill of lading shall be liable for any damage to the property caused by its negligence or that of any other carrier to which the property may be delivered or over whose lines it may pass, and that the initial carrier shall be entitled to recover the amount of any damage it may be required to pay from the carrier through whose negligence the damage was sustained. *Held*, that the common carrier cannot, by contract with the shipper, relieve itself from liability for the negligence of a connecting carrier.—*Crayeroff v. Atchison, T. & S. F. Ry. Co.*, 18 Mo. App. 487.

**App.** Rev. St. 1879, § 598, providing that in case of a transportation over several lines of road the carrier who receives the goods shall be responsible for the negligence of the connecting carrier, establishes a rule of public policy which the carrier cannot avoid by contract with a shipper.—(1886) *Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333; (1889) *Baker v. Missouri Pac. Ry. Co.*, 34 Mo. App. 98; (1891) *Watkins v. St. Louis, I. M. & S. Ry. Co.*, 44 Mo. App. 245.

**App. 1909.** An initial carrier cannot restrict its liability for the negligence of itself or its connecting carriers.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

**App. 1909.** An initial carrier, contracting for through carriage of freight, is liable for the loss thereof occurring anywhere on the route, unless the loss is due to the act of God or the public enemy, and a limitation of his common-law liability, or a provision limiting its liability to a loss on its own line, not supported by a consideration, is inoperative.—*Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co.*, 120 S.W. 663, 140 Mo. App. 130.

**App. 1910.** Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591,

§ 7, 34 Stat. 593), prohibiting contracts exempting carriers from liability for loss on a connecting line, does not prevent an agreement limiting a carrier's liability to an agreed valuation in consideration for a reduced rate.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S. W. 736, 151 Mo. App. 126.

**App. 1916.** Bill of lading issued by initial carrier of interstate shipment, liable under the Carmack Amendment to the Hepburn Act for loss, etc., of property requiring written notice thereof within four months, etc., held to require such notice, even in case of final carrier's willful disdelivery.—*Kemper Mill Co. v. Missouri Pac. Ry. Co.*, 186 S.W. 8, 193 Mo. App. 466, transferred from Supreme Court *Kemper Mill & Elevator Co. v. Same* (1915) 178 S.W. 502.

180 (2). Power to limit liability to carrier's own line.

Under Rev. St. 1889, § 944, providing that when a carrier receives property to be transported from one place to another, within or without the state, it shall be liable for any loss, damage, or injury to such property caused by the negligence of a connecting carrier, a railway carrier receiving goods in this state to be shipped over its own and connecting lines to the point of destination may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier.

—**Sup. 1891.** *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 15 S.W. 761, 103 Mo. 433;

**App. 1891.** *Hill v. Missouri Pac. Ry. Co.*, 46 Mo. App. 517.

**Sup. 1891.** A bill of lading by a railway company of goods to be transported over its own and connecting lines stipulated that damages for loss or injury sustained in transit should be recoverable against the particular railway company having custody of such goods at the time of such loss or injury. *Held*, that defendant was liable for loss or damage on its own line only.—*Nines v. St. Louis, I. M. & S. Ry. Co.*, 18 S.W. 26, 107 Mo. 475.

**Sup. 1897.** Const. Neb. art. 11, § 4, declaring that "the liability of railroad corporations as common carriers shall never be limited," does not affect a contract limiting the receiving carrier's liability to loss occurring on its own lines.—*Miller Grain & Elevator Co. v. Union Pac. Ry. Co.*, 40 S.W. 894, 138 Mo. 658.

**Sup. 1903.** Where a railway company receives goods for shipment beyond its line, and

collects the entire charge for transportation, it assumes the responsibility for safe carriage over every part of the route, and such liability cannot be limited by express contract.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.*, 75 S.W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

**Rev. St. 1899, § 5222,** providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any loss, damage, or injury to the property caused by its negligence, or the negligence of any other carrier to which the property may be delivered, or over whose lines it may pass, etc., when construed as depriving a carrier of the right to contract for a limitation of liability beyond its own line with respect to a through shipment, is not unconstitutional.—*Id.*

Where a carrier issued a bill of lading in Missouri for a through shipment beyond its own line to a point in Arkansas, it could not exempt itself from liability for a conversion of the property by a connecting carrier by a provision in the bill limiting its liability to its own line.—*Id.*

**App. 1894.** In an action for loss of goods shipped under a bill of lading exempting the railroad from loss by fire or for loss beyond its own line, an instruction that, if plaintiff paid the full rate of freight charged for such goods and the defendant made no reduction or special rate, the jury may disregard the special contract, is erroneous, since the clause exempting it from loss beyond its own line is valid without consideration.—*Hance v. Wabash Western Ry. Co.*, 56 Mo. App. 476.

**App. 1894.** A bill of lading for the shipment of goods over connecting lines provided that the responsibility of the initial carrier should not extend beyond its own line. This provision was printed in minion sized type with green ink, and was easily readable. Over the face of the bill of lading the word "Original" was stamped in large red letters, which did not render the minion type illegible, or cover the provision as to responsibility beyond its own line. *Held*, that the consignor was bound by such provision, and hence could not recover where the injury occurred on the line of a connecting carrier.—*Patterson v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 657.

**App. 1894.** A contract by a consignor and a railroad company that the liability of the company shall cease after the goods pass out of its possession is valid, and an omission in the name of the station where the liability

ceases is immaterial.—*Minter v. Southern Kansas Ry. Co.*, 56 Mo. App. 282.

Under Rev. St. 1889, § 944, a provision in a bill of lading that the responsibility of the common carrier should cease at the station where the goods were delivered to the connecting carrier was valid, notwithstanding the provision of the statute.—*Id.*

**App.** Under Rev. St. 1889, § 944 (Laws 1879, p. 171), a railroad company cannot contract for a through shipment to a point beyond its own line and at the same time exempt itself from liability for negligence of the connecting carrier.—(1897) *State Nat. Bank v. Chicago Great Western Ry. Co.*, 72 Mo. App. 82; (1904) *Nenno v. St. Louis & S. F. R. Co.*, 80 S.W. 24, 105 Mo. App. 540.

**App.** 1899. Where a carrier unconditionally and absolutely binds himself to carry freight from a point on the line of its railway to a point in another state under a bill of lading providing that it shall be forwarded by the defendant carrier and the forwarding lines with which it connects, and that the carrier shall not be accountable for any damage after the freight shall have been receipted for by the next succeeding carrier, there being an unconditional and absolute undertaking to transport the freight to its destination, the exemption clause cannot be invoked to relieve it from liability.—*Popham v. Barnard*, 77 Mo. App. 619.

**App.** 1901. A carrier cannot contract for a through shipment and at the same time exempt himself from liability on account of the negligence of connecting carriers.—*Jones v. St. Louis & S. F. R. Co.*, 89 Mo. App. 653; *Redmon v. Chicago, R. I. & P. R. Co.*, 90 Mo. App. 68.

**App.** 1905. Where a common carrier contracts to transport goods from one point to another, necessarily over connecting lines, it is not prevented on grounds of public policy from contractually limiting its liability for the negligence of the connecting carriers.—*Eckles v. Missouri Pac. Ry. Co.*, 87 S.W. 99, 112 Mo. App. 240.

**App.** 1906. Where the carrier receives freight, and issues a bill of lading to a destination beyond its line, it is liable for the negligence of connecting carriers, unless the contract stipulates that the carrier is only to transport the shipment to the end of its line, and a stipulation that the initial carrier is to be relieved of responsibility beyond its line is unavailing.—*Lee v. Wabash R. Co.*, 94 S.W.

991, 118 Mo. App. 476; *Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618; *Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644; *McLendon v. Wabash R. Co.*, 95 S.W. 943, 119 Mo. App. 128.

**App.** 1906. A contract made in New York for the transportation of fish from New York to Kansas City over the lines of two connecting carriers, expressly stipulating that the fish should be carried by the initial carrier to the end of its own line, and that such carrier should not be responsible for a loss occurring beyond its own line, was valid, and precluded a recovery against the initial carrier for injuries sustained through the negligence of the connecting carrier.—*McLendon v. Wabash R. Co.*, 95 S.W. 943, 119 Mo. App. 128.

**App.** 1906. A carrier contracting to carry a shipment to its destination, a point beyond its line, is liable for damages resulting from negligent delay in the transportation, whether the delay occurred on its own line or that of a connecting carrier, though the bill of lading restricted its liability to the consequences of its own acts.—*Hardin v. Missouri Pac. Ry. Co.*, 96 S.W. 681, 120 Mo. App. 203.

**App.** 1907. A provision in a carrier's bill of lading prohibiting its agent from contracting for the delivery of goods beyond its own route was a nullity, the agent being required to receive the goods for transportation, though entitled to limit his employer's liability to its own line.—*Marshall Medicine Co. v. Chicago & A. R. Co.*, 104 S.W. 478, 126 Mo. App. 455.

**App.** 1909. Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that where property is received by a carrier it shall be liable for any loss or damage to the property by its negligence or the negligence of any other carrier to which the property may be delivered, impliedly allows an initial carrier to restrict its liability as insurer to its own line, notwithstanding the main purpose of the act is to make it liable for negligence occurring on a connecting line, and makes a carrier issuing a bill of lading in the state liable for damage to property caused by its negligence or the negligence of a connecting carrier.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

As to interstate through shipments made by an initial carrier before the amendment of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat.

593), forbidding the limitation by an initial carrier of its liability as insurer where it contracts to carry through, it could limit its liability as insurer for a consideration such as a reduced rate of freight.—Id.

**App. 1909.** A receipt by an initial carrier of freight recited that the goods were received in good order for the consignee, subject to bill of lading, and provided that the property received on the dray ticket was subject to the conditions of the bill of lading. The bill of lading contracted for the carriage of the freight to the consignee or to a connecting carrier, and limited liability for loss to that occurring on its own line. *Held*, that the receipt and bill of lading did not establish a contract for through carriage, and the initial carrier was liable only for loss on its own line.—*Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co.*, 120 S.W. 663, 140 Mo. App. 130.

Under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that when property is received by a carrier for transportation, or when a carrier issues a bill of lading, it shall be liable for loss of the property caused by its negligence, or that of another carrier to which the property is delivered, a carrier receiving property for transportation over its own line and other lines need not contract to carry beyond its own line; but, where in the main clause of the contract it undertakes to carry to destination, it cannot limit its statutory liability by exceptions set out in subsequent clauses, but where it specially contracts in the main clause to carry only to the end of its line, its liability extends no further.—Id.

**App. 1910.** Where, by the principal contracting clause in a bill of lading, the initial carrier issuing it agreed to carry from a point on its own line through to destination at a point on a connecting line, the contract was an undertaking for through carriage to destination so as to make it liable for negligent losses occurring on the connecting line under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), making the carrier issuing the bill of lading liable for injuries caused by the negligence of any other carrier, though a subsequent clause of the bill of lading provided that it should carry the goods to the end of its own line and deliver to the connecting carrier, when its liability should cease.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

Where the bill of lading issued by the initial carrier provided that it should transport the freight only to the end of its own line for delivery there to the connecting carrier for

transportation to destination as the agent of the shipper, and not of the initial carrier, and that the latter should be liable only for loss occurring on its own line while the freight was in its actual custody, the initial carrier's contract was not for through shipment, so that it was only liable for negligent losses occurring on its own line.—Id.

**App. 1910.** Where a carrier by bill of lading agrees to carry goods to the destination if on its road, or, if the destination is not on its road and the company guarantees a through rate to destination, then it agrees to deliver to the other carrier, but does not agree to carry to any point beyond its own line, or be responsible beyond its own line, and guarantees a certain rate to a point beyond its own line, the contract is one for through transportation, and the carrier cannot limit its liability for negligence of the connecting carrier.—*Central American S. S. Co. v. Mobile & O. R. Co.*, 128 S.W. 822, 144 Mo. App. 43.

**App. 1911.** Where an initial carrier contracts for a through shipment, the connecting carriers are regarded as its agents making it liable for their negligence, notwithstanding a provision in a contract exempting it from liability beyond its line.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

An initial carrier's contract to transport from a point on its line to C. via a certain connecting carrier "at" K., an intermediate point beyond the initial carrier's line, is a contract for through shipment, making the initial carrier liable for negligence of a connecting carrier in preventing exercise of the shipper's right to divert the shipment at K. by taking the car over another route, notwithstanding a provision in the contract exempting it from liability for connecting carrier's negligence.—Id.

**App. 1911.** Where an agent of a railroad company receives goods for transportation, and fails to limit his company's liability to liability for negligence on its own line, and issues a bill of lading for shipment over the line of a connecting carrier, the right to limit the liability of his own company to negligence on its own line is lost, and the provisions of the bill of lading prohibiting the agent from contracting for shipment beyond defendant's line becomes a nullity.—*Miller v. Missouri, K. & T. Ry. Co.*, 138 S.W. 902, 157 Mo. App. 638; *Steckdaub v. Same*, 138 S.W. 904.

**App. 1912.** A stipulation in a bill of lading issued by an association of several car-

riers *held* without force, where damage to freight results from a carrier's negligence.—*R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co.*, 143 S.W. 839, 163 Mo. App. 426.

§180 (3). Operation and effect of limitation.

**Sup. 1881.** A connecting carrier receiving goods from an initial carrier is entitled as against the shipper to the benefit of all limitations of liability contained in the initial carrier's contract with the shipper.—*Halliday v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309.

**Sup. 1903.** Goods were delivered to a carrier for shipment to a point outside of the state. Before the shipment was made, the shipper inquired of the agent of the carrier whether it carried goods to that place, and was informed that it did. The carrier issued a bill of lading which indicated the place of destination, and which recited that the carrier received the goods to be forwarded subject to the rules and conditions printed on the regular shipping bills. The place of destination was not on the carrier's line, but on the line of another carrier, with which a joint traffic arrangement existed. *Held*, that the contract was for through shipment, and under Rev. St. 1889, § 944, the initial carrier was liable for the negligence of the connecting carrier causing injury to the goods, notwithstanding a stipulation in the bill of lading limiting the liability of the initial carrier to its own line.—*Western Sash & Door Co. v. Chicago, R. I. & P. R. Co.*, 76 S.W. 998, 177 Mo. 641.

**App. 1897.** A bill of lading which recited that the carrier received from the shipper certain goods consigned to Boston, and which stipulated that the carrier would transfer the same over its line of railway to Chicago, and there deliver the consignment to a connecting carrier, and expressly limited the responsibility of the initial carrier so that its liability should cease at the station of delivery or tender to the connecting carrier, obligates the carrier to transport the goods only to the end of its line, and therefore it is not liable for the negligence of the connecting carrier.—*State Nat. Bank v. Chicago Great Western Ry. Co.*, 72 Mo. App. 82.

**App. 1897.** A railroad company received pay for transporting goods for the whole route. The company's soliciting agent solicited the shipment and selected the connecting lines over which the shipment would be made. The contract of shipment provided that for all

loss occurring in the transit the legal remedy should be against the particular carrier in whose custody the goods might actually be at the time of the damage. *Held*, that the initial carrier was liable for a loss sustained on the line of a connecting carrier; the contract of shipment obligating the initial carrier to transport the goods from the starting point to their place of destination.—*Eckles v. Missouri Pac. Ry. Co.*, 72 Mo. App. 296.

**App. 1898.** Rev. St. 1889, § 944, provides that a carrier issuing a bill of lading for the transportation of goods shall be liable for any loss or injury thereto caused by its negligence or the negligence of any connecting carrier. A carrier received freight destined to a point beyond its own line. The bill of lading was blank as to the point of shipment, and stipulated that the carrier should not be liable for loss occurring beyond its own line. The freight charges for the whole distance were paid to the carrier. *Held*, that it was liable for a connecting carrier's conversion of the goods.—*Marshall v. Kansas City, Ft. S. & M. Ry. Co.*, 74 Mo. App. 81.

**App. 1901.** Where an original contract of shipment expressly provided that each carrier on the line should be liable only for whatever negligent act was committed by it upon its own line and no other, the final carrier was not liable for any loss or damage to goods prior to their delivery to it.—*Pearce v. Wabash R. Co.*, 89 Mo. App. 437, reversed *Wabash R. Co. v. Pearce* (1904) 24 S. Ct. 231, 192 U. S. 179, 48 L. Ed. 397.

**App. 1904.** Where a bill of lading stated that the initial carrier had received the goods to be transported and delivered to the succeeding carrier, to be forwarded to destination, it being expressly agreed that the initial carrier's responsibility ceased on the arrival of the goods at its terminal depot, where they were to be delivered to the connecting carrier, such contract, in the absence of statute, limited the initial carrier's liability to loss accruing on its own line, though the blank in the bill for the insertion of the connecting point was not properly filled.—*Nenno v. St. Louis & S. F. R. Co.*, 80 S.W. 24, 105 Mo. App. 540.

**App. 1905.** Defendant railroad company contracted to carry freight to a point beyond its line; the contract providing that the carrier should be liable only for the safe carriage of the goods on its own road, that the exceptions from liability made by all the carriers through whose hands the goods might pass should respectively operate in the carriage by

them respectively, and that the liability of the companies as common carriers terminated on the arrival of the goods at the terminal station. The contract also provided that the goods should be transported over defendant's own line to a certain point, and there delivered to a certain named connecting carrier, with which defendant had a traffic arrangement. The freight charges for the entire distance were received by defendant. *Held*, that defendant was liable for a loss not occurring on its own line; the exemption clause in the contract of shipment being merely for the purpose of fixing liability as between the several carriers, and not restricting defendant's liability to the shipper.—*Eckles v. Missouri Pac. Ry. Co.*, 87 S.W. 99, 112 Mo. App. 240.

⚡180 (4). **Limitation to liability of forwarder or warehouseman.**

*See explanation, page iii.*

⚡180 (5). **Right of subsequent carrier to benefit of limitation by first carrier.**

*See explanation, page iii.*

⚡180 (6). **Effect of violation of contract by carrier.**

*See explanation, page iii.*

⚡181. **Actions against connecting carriers.**

⚡181½. — **Nature and form.**

**Sup. 1881.** A shipper of goods which must pass over more than one line to their destination may sue the connecting carrier directly for a negligent injury to the goods in his hands.—*Halliday v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309.

⚡181½. — **Rights of action.**

**App. 1917.** In absence of evidence tending to show shipper of goods chose to regard initial carrier as debtor or agent to collect price of goods from consignor, who obtained possession without surrender of bill of lading, *held*, that consignee could not uphold garnishment of initial carrier as debtor or shipper.—*Peycke Bros. Commission Co. v. Sandstone Co-op. Co.*, 191 S.W. 1088, 195 Mo. App. 417.

**App. 1921.** Provision in Carmack Amendment to the Interstate Commerce Act that nothing contained therein should deprive the holder of a bill of lading of any remedy or right of action which he has under existing law, has reference only to federal laws.—*Bernie Mill & Gin Co. v. St. Louis Southwestern Ry. Co.*, 228 S.W. 847.

⚡182. — **Jurisdiction and venue.**

**Sup. 1923.** Under the provision of Carmack Amendment preserving existing rights, jurisdiction may be obtained in a state court over a nonresident initial carrier to enforce its liability under that amendment by attachment of the goods of such carrier without personal service.—*State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 298 Mo. 474, certiorari granted *State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 44 S. Ct. 132, 263 U. S. 696, 68 L. Ed. 511, and judgment affirmed (1924) 45 S. Ct. 47, 266 U. S. 200, 69 L. Ed. 247, 42 A. L. R. 1232.

⚡183. — **Parties.**

**App. 1910.** A partnership among several carriers entering into a joint undertaking to carry particular freight is not essential to authorize a recovery under Rev. St. 1899, § 5222, as amended by Laws 1905, p. 53 (*Ann. St. 1906*, p. 2718), permitting a plaintiff to unite as defendants, in an action for injury to freight, all carriers through whose hands the freight passed, and recover against the culpable defendant.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

**App. 1916.** Under the Carmack Amendment to the Hepburn Act, one making an interstate shipment might sue not only the initial carrier, but the carrier whose negligence caused the loss.—*Conley v. Chicago, B. & Q. R. Co.*, 183 S.W. 1111, 192 Mo. App. 534.

⚡184. — **Pleading.**

**Sup. 1881.** In an action by a shipper of goods against a connecting carrier defendant cannot avail itself of limitations of liability contained in the contract with the initial carrier, unless it pleads such limitations.—*Halliday v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309.

**Sup. 1923.** A petition against a railroad company, alleging that goods were delivered to the company, which operated lines only within the state of shipment, for transportation to points in other states, that the plaintiff had become the owner of the goods, and that through the defendant's negligence and violation of its common-law duty as a common carrier the goods were damaged, states a cause of action under Carmack Amendment, though it does not expressly allege that a bill of lading had been issued by the defendant carrier.—*State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 298 Mo. 474, certiorari granted *State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 44



S. Ct. 132, 263 U. S. 606, 68 L. Ed. 511, and judgment affirmed (1924) 45 S. Ct. 47, 266 U. S. 200, 69 L. Ed. 247, 42 A. L. R. 1232.

An allegation in a petition that goods were delivered to a carrier in a named state outside of which it did not operate, for shipment to a destination in another state, is equivalent to an allegation that a through bill of lading was issued to that destination, since the carrier was required by Carmack Amendment to issue a through bill of lading, and the presumption will be indulged that it did what the law required it to do.—*Id.*

**Sup. 1927.** Where petition alleged delivery of baggage to defendant railroads as successive carriers, but proof showed new and independent contract with appellant transfer company, there was variance.—*Ford v. Wabash Ry. Co.*, 300 S.W. 769, 318 Mo. 723, affirming judgment (App. 1924) 266 S.W. 1032.

**App. 1906.** A petition alleging that defendants were common carriers, that there existed between them a joint traffic arrangement for transportation of freight from points on the line of one defendant to points on the line of the other, that plaintiff delivered to defendant G., at F., and it received for transportation over its line and that of defendant M., goods of plaintiff, for which G., in consideration of freight charges, issued a bill of lading, and agreed on behalf of itself and M. to transport and deliver them to plaintiff at L., which agreement was afterwards adopted and ratified by M., and the goods were delivered to M. at K., and that M. failed to deliver part of the property to plaintiff at the place of delivery, does not state a case of joint contract by defendants.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1911.** A variance between allegation that defendant carrier agreed to carry freight to an intermediate point and there deliver to a connecting carrier, and proof of a through shipment via the connecting line "at" that point, was immaterial, especially where the bill of lading was filed with the statement.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

**App. 1923.** Where an action against carrier for damages to a shipment of potatoes was commenced in justice court in which there are no formal pleadings and great liberality is indulged in respect to the statement of a cause of action, and the complaint alleged delivery to defendant, a connecting carrier, whereas the evidence showed delivery

by plaintiff to another, the initial carrier, *held*, that the variance is to be regarded as not material and hence not prejudicial where no affidavit of surprise was filed.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

## 185. — Evidence.

### 185 (1). Presumptions and burden of proof.

**Sup. 1923.** In the absence of allegations to the contrary petition alleging loss or damage occurred to a shipment moving over connecting railroads should be construed as charging that the loss was caused by the delivering carrier, since the presumption is that the loss occurred on the lines of such carrier unless the contrary appears.—*State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, certiorari granted *State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 44 S. Ct. 132, 263 U. S. 606, 68 L. Ed. 511, and judgment affirmed (1924) 45 S. Ct. 47, 266 U. S. 200, 69 L. Ed. 247, 42 A. L. R. 1232.

**App. 1890.** The rule that a common carrier is not liable for loss or injury beyond its own line is tantamount to the statement that, in order to charge it, the burden is on the shipper to show that the loss happened on its line, and where the shipper merely shows non-delivery, or delivery in a damaged condition by the terminal carrier, the presumption is that that carrier has been at fault, giving the shipper a *prima facie* right of action against it.—*Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

**App. 1891.** Where it appears that goods were delivered to one carrier for shipment to a point beyond its line, properly packed and loaded, and that the goods were delivered in bad order by the terminal carrier, and there is no direct evidence on the question when, how, or where the goods were injured, the burden is on the terminal carrier to show that the goods were damaged when they came on his line.—*Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424.

**App. 1906.** A final carrier cannot be held liable for defaults of previous carriers in the performance of the contract of carriage, on the theory that it was a connecting carrier and handled the goods under the original contract of affreightment, in the absence of evidence in support of that theory.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.*, 92 S.W. 714, 116 Mo. App. 214.

**App. 1906.** The initial carrier of goods sent them to the connecting carrier, accompanied by a receipt containing a list of the articles, among which was "1 box books," following which was "1 box household goods." The connecting carrier signed and returned the receipt, with a check mark opposite "1 box books," and with the word "short" written at the bottom of the paper opposite a similar check mark, indicating that the box of books was not with the goods received. *Held*, that prima facie the receipt was an admission by the connecting carrier that it received the box of goods, imposing on it the burden of overcoming the presumption arising therefrom, and that this was not conclusively done, but only made a question for the jury, by the fact that the consignee made no claim that the box of books was not delivered to him, but merely claimed that the box of goods was not delivered to him.—*Meyers v. Missouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1909.** Under Rev. St. 1899, § 5222, as amended by Laws 1905, p. 54 (Ann. St. 1906, p. 2718), allowing an owner of damaged property which has been transported by several connecting carriers to join in his action for damages the initial carrier and all the others, and permitting him to recover from the one through whose negligence the injury was sustained, the plaintiff in such an action must not only prove that the property was damaged by negligence, but must prove which carrier damaged it.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

**App. 1909.** There is no presumption as against a shipper that a through shipment of goods delivered by one carrier to a connecting carrier was in good order at the time because they were received without objection.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 13, 137 Mo. App. 133.

Where a shipper sued carriers for damage to goods during a through shipment, it was essential not only to prove the damage, but which carrier caused it.—*Id.*

**App. 1910.** In an action against both the initial and connecting carrier under Rev. St. 1899, § 5222, as amended by Laws 1905, p. 53 (Ann. St. 1906, p. 2718), making the carrier issuing a bill of lading liable for injuries by the negligence of any other carrier over whose line the goods passed, and permitting a plaintiff to unite as defendants, in an action for negligent injury to freight, all carriers through whose hands the freight passed, and

recover against the negligent defendant, plaintiff must prove the negligence of one of the carriers to recover against it, there being no presumption of negligence by the last carrier, where the action is for negligent injuries, and the initial carrier cannot be held liable without proof of negligence on the ground that it has a remedy over under Rev. St. 1899, § 2870 (Ann. St. 1906, p. 1654), allowing contribution among judgment defendants in tort actions to the same extent as in contract actions; that section only applying to joint tort-feasors.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

In absence of statute, the initial carrier would be prima facie liable for injury to shipments en route, but could relieve itself of such liability by proving delivery in a reasonable time and in good order to the connecting carrier.—*Id.*

**App. 1911.** A shipper of an interstate shipment, to maintain a joint liability against the initial and connecting carriers, has the burden of showing that the damage to the shipment was caused by the connecting carrier.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 134 S.W. 665, 154 Mo. App. 420, opinion adopted (1912) 144 S.W. 1199, 164 Mo. App. 444.

**App. 1912.** Where goods in sound condition are delivered to an initial carrier for transportation, and are never delivered by the connecting carrier or are delivered in a damaged state, the presumption is that the connecting carrier is responsible for the damage or loss, and, in the absence of evidence to the contrary, no recovery may be had against the initial carrier therefor.—*Bockserman v. St. Louis & H. Ry. Co.*, 152 S.W. 389, 169 Mo. App. 168.

**App. 1915.** Where the initial carrier receives for through shipment goods in good condition and any connecting or terminal carrier delivers them in bad condition, the presumption is that the injury occurred while in the possession of the connecting or terminal carriers.—*Keithley v. Lusk*, 177 S.W. 756, 190 Mo. App. 458.

**App. 1917.** Where it is shown that shipment was delivered to original carrier in good condition, presumption is that it remained so until it arrived in hands of terminal carrier.—*Equity Elevator Co. v. Union Pac. R. Co.*, 191 S.W. 1067.

**App. 1917.** In the absence of any evidence to the contrary, the presumption is that damage or loss of goods occurred while

in the possession of the last carrier.—*Zerilli v. Ross*, 198 S.W. 487.

**App. 1921.** A shipper suing a terminal carrier for damages to tomatoes had the burden of showing that when they were delivered to initial carrier they were in good condition, in order that the presumption of injury in the hands of terminal carrier should attach by proof of delivery in damaged condition.—*Krallman v. Illinois Cent. R. Co.*, 235 S.W. 830, 209 Mo. App. 286.

**App. 1923.** Notwithstanding the Carmack Amendment, the rule still prevails that, where goods are delivered in good condition to the initial carrier, and are found damaged when delivered by the terminal carrier, and it is not shown which carrier was negligent, the presumption is that it was the terminal carrier.—*Letner v. Missouri Pac. R. Co.*, 249 S.W. 155, 215 Mo. App. 448.

**App. 1923.** Where it appears that goods were delivered to the initial carrier in good condition, the presumption is indulged prima facie that they remained in that condition to the time of their delivery to the last or delivering carrier and that the injury or loss occurred while in that carrier's possession, and this presumption has not been changed or abrogated by the provisions of the Carmack Amendment.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

**App. 1923.** An initial carrier undertaking to make through shipment to a point in another state is prima facie liable for loss occurring on its own line or the line of any connecting carrier utilized as its agent for completing transportation and delivering the goods, irrespective of the Carmack Amendment to the Interstate Commerce Act.—*Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co.*, 251 S.W. 466.

Under the Carmack Amendment to the Interstate Commerce Act, a carrier accepting goods for shipment to a point on another line in another state is conclusively treated as having made a through contract, thereby electing to treat connecting carriers as its agents for all purposes of transportation and delivery, and hence must prove that any loss in transit resulted from some cause for which it is not responsible; the presumption being that the loss resulted from the negligence of the initial carrier or its agents.—*Id.*

**App. 1923.** When it is shown that goods of a certain quantity and in good condition are delivered to the initial carrier, and the

shipment is delivered by the terminal carrier in a damaged condition or deficient in quantity, the law raises the presumption that the goods continued in good condition or proper quantity down to their delivery to the terminal or last carrier, and that the injury or loss occurred while the goods were in the latter carrier's possession.—*Block Bros. Clothing Co. v. Missouri Pac. R. Co.*, 253 S.W. 35.

Before the owner of goods is entitled to the benefit of the presumption that goods lost in transit were lost while in the possession of the terminal carrier, he must show that the loss occurred in transit.—*Id.*

**App. 1924.** If an interstate shipment was delivered in good condition to the initial carrier, and was damaged when delivered by the last delivering carrier, the latter was rebuttably presumed negligent, in view of Carmack Amendment to the Interstate Commerce Act, providing that the amendment shall not deprive the holder of any receipt or bill of lading of any remedy or right of action under existing law.—*American Fruit Growers v. Cleveland, C., C. & St. L. Ry. Co.*, 263 S.W. 488.

#### 185(2). Admissibility of evidence.

**Sup. 1876.** Where an action is brought against an express company to recover money alleged to have been lost from a package delivered to such company, and for which a receipt reciting that it was received "upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company," etc., was given, the defendant is entitled to show that the package when received was securely sealed, and that it was transmitted and delivered just as it was received, in good order, without being broken or mutilated.—*Snider v. Adams Express Co.*, 63 Mo. 376.

**Sup. 1922.** Where two cars of corn meal reconsigned by the terminal carrier on the alleged authority of consignor's agent were part of a larger order of 10,000 sacks of meal, testimony that other cars in such consignment were reconsigned with consignor's consent in the same manner as the two cars in question was admissible on the issue of authority to reassign without surrender of the bills of lading.—*Kemper Mill & Elevator Co. v. Illinois*, 239 S.W. 803, 293 Mo. 88.

**App. 1906.** Testimony of the agent of the G. Company at K., the terminus of G.'s line, that the goods which G. received of plaintiff at F. under a contract to carry them to L., a point beyond its line, arrived intact at K., and were sent over in wagons to the yards of the M. Company, a connecting carrier, the waybill and a receipt for the goods being sent by messenger to M.; that a few days later the receipt, bearing the signature of M.'s agent, was returned to G.'s office by railroad mail, an initial letter following the signature indicating that the name of M.'s agent had not been signed by him; that G.'s agent did not know of his own knowledge who signed the receipt, or that any of the property had been delivered to M., but that in this instance he followed the usual course of dealing observed by the two carriers in like cases, and the receipt came back to him through the customary channel, signed by the same person and in the same manner as other like receipts had been signed; and that it was not customary for freight agents to sign such receipts, but to permit that to be done by a receiving clerk, together with proof that M. delivered all the property, except a missing box, to plaintiff at L.—tend to show that the receipt was regularly issued by M., and to authorize its admission in evidence in an action against M. for the missing box; its liability depending on proof that it received the box in the course of its transportation.—*Meyers v. Misouri, K. & T. Ry. Co.*, 96 S.W. 737, 120 Mo. App. 288.

**App. 1911.** An initial carrier's obligation to carry freight beyond its line can be shown by usage or conduct.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.*, 134 S.W. 111, 155 Mo. App. 175.

#### —185 (3). Sufficiency of evidence.

**App. 1880.** Sufficiency of evidence as to relation between connecting railroads. See *Watkins v. Terre Haute & I. R. Co.*, 8 Mo. App. 570, memorandum.

**App. 1886.** Plaintiff testified that he delivered to defendant railroad a box of goods which he desired shipped to S., a point on a connecting line, that the goods were so tagged, that he directed them shipped to S., that his son delivered the goods to the station agent, and that he did not see him himself. The bill of lading issued by defendant was as follows: "Received from O. the packages numbered and described as follows, ——— to be transported on the line of this road from ——— to ——— station, and delivered to the consignee or owner at said sta-

tion last mentioned, or if the same are to be forwarded beyond said station to any company or carrier receiving or which may receive freight," etc. *Held* not to show a valid contract to carry the goods beyond the terminus of defendant's line.—*Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333.

**App. 1890.** In an action against an initial carrier for damages to goods delivered at their destination by the terminal carrier, evidence examined, and *held* to fail to show that the goods were damaged while in the possession of the initial carrier, relieving it from liability in the absence of a contract express or implied making it liable for the transportation of the goods for the entire route.—*Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

**App. 1894.** Where a shipper testifies that he made an agreement for a through shipment with the general agent of a railroad and paid the full freight charged, and the bill of lading issued by the local agent was to a place beyond the terminus of its route, a prima facie case was established.—*Hance v. Wabash Western Ry. Co.*, 56 Mo. App. 476.

**App. 1908.** When property is delivered to a carrier in good order to be transported over its line and that of one or more connecting carriers, and is damaged en route, proof that the goods were delivered to the owner at destination by the final carrier in bad order established a prima facie case against it.—*Connelly v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 310.

**App. 1909.** Testimony *held* not to show distinct contracts with two carriers that each should carry goods only over its own line, but, instead, a joint contract with both for a through shipment.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 13, 137 Mo. App. 133.

**App. 1912.** In an action against an initial carrier for the loss of goods shipped under a bill of lading exempting the carrier from all liability for loss by fire and limiting its liability to its own line, evidence *held* insufficient to show a delivery by defendant to the connecting carrier or that the goods were destroyed by fire.—*Henry Bromschwig Tailors' Trimming Co. v. Missouri, K. & T. Ry. Co.*, 147 S.W. 175, 165 Mo. App. 350.

**App. 1914.** Evidence, in an action against connecting carriers, *held* insufficient to show that oysters were spoiled by trans-

portation in a defective car.—*Smith v. Gulf, C. & S. F. Ry. Co.*, 164 S.W. 132, 177 Mo. App. 269.

**App. 1916.** Evidence *held* not to conclusively show that a shipment of goods over connecting lines was not under a contract of through shipment.—*Keithley & Quinn v. Lusk*, 189 S.W. 621, 195 Mo. App. 143.

**App. 1918.** In an action against carriers to recover for loss of goods shipped, evidence, including receipt absolving receiving carrier from responsibility for "quality, quantity or condition of contents," *held* to show that such carrier was acting only as agent for the next carrier for the purpose of switching the car from the place of loading.—*Central Nat. Bank v. Pryor*, 207 S.W. 298.

**App. 1921.** In an action against a connecting carrier for conversion of a shipment, evidence *held* to show that an order for diversion of the shipment was received and accepted by the defendant.—*Burrell Collins Brokerage Co. v. Hines*, 230 S.W. 371, 206 Mo. App. 609.

**App. 1921.** Recital in bill of lading as to tomatoes being "in apparent good order (contents, inward condition, and value unknown)" was an acknowledgment that goods were apparently in good condition and *prima facie* evidence against the carrier who issued it, but not against terminal carrier not a party to the bill of lading, since such terminal carrier by transportation of shipment over its line was bound by bill of lading only in so far as it was a contract for carriage, and since such recital did not constitute a part of the contract for carriage.—*Krallman v. Illinois Cent. R. Co.*, 235 S.W. 830, 209 Mo. App. 286.

**App. 1923.** In owner's action for loss of part of shipment of men's suits, evidence that there was much stealing from the railroads of goods in transit at the time, that there was ample opportunity while the goods were in defendant's car for the box of clothing to have been opened and the clothing to have been abstracted, in connection with proof that, on claim made, the defendant carrier, on requesting credit for odd coats and pants not stolen, was sent such odd pieces by plaintiff and retained them, *held* sufficient to support finding that goods were lost while in defendant's custody.—*Block Bros. Clothing Co. v. Missouri Pac. R. Co.*, 253 S.W. 35.

**App. 1925.** Shipper *held* to make out a *prima facie* case of liability against carrier for injury to shipment.—*Marshall Land &*

*Mercantile Co. v. Missouri Pac. R. Co.*, 270 S.W. 422.

#### 186. — Damages.

**App. 1909.** If an initial carrier charges full rates on a through shipment, making it an insurer, the measure of damages as against it for injury to the goods would be the difference between the value of the goods at destination, if sound, and the value as they arrived.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

If the initial carrier charged a reduced rate on a through shipment of sewer pipe in consideration of an exemption from its liability as insurer, the measure of damages as to the carrier in fault, where the goods were negligently injured, would be the difference between the value of the goods at destination less usual breakage, and their value in the condition in which they really arrived.—*Id.*

**App. 1921.** In an action for the conversion of an interstate shipment of lumber brought, not against the initial carrier, but for a conversion alleged to have occurred after the transportation had been completed and the consignee had redelivered the lumber to be carried on another contract, the state rule that the measure of damages is the value of the property at the time and place of conversion was properly applied.—*Buschow Lumber Co. v. Hines*, 229 S.W. 451, 206 Mo. App. 681.

**App. 1925.** Measure of damages against carrier for loss or damage to goods shipped stated.—*Marshall Land & Mercantile Co. v. Missouri Pac. R. Co.*, 270 S.W. 422.

#### 187. — Trial.

**App. 1908.** Where, in an action against an initial carrier for injuries to goods, there was evidence justifying the submission of the question whether the injury occurred on such carrier's line to the jury, it was error to charge that, in the absence of evidence to the contrary, it would be presumed that any damage to the goods occurred while they were in the hands of the last carrier before the damage was discovered was erroneous, as conceding the possibility that there was no evidence that the loss occurred on the initial carrier's line.—*Connely v. Illinois Cent. Ry. Co.*, 113 S.W. 233, 133 Mo. App. 310.

**App. 1909.** In an action against connecting carriers for damages to goods in transit shipped on a through bill of lading providing for immunity of the initial carrier from lia-

bility for breakage in consideration of a reduced rate, where the evidence as to whether there was a reduced rate was conflicting, a charge exempting defendants from liability if the quantity of breakage was only such as was usually incident to the shipment of such goods was erroneous, since it would not be correct as to the initial carrier unless there was a reduced rate.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 1, 137 Mo. App. 479.

**App. 1909.** A requested charge, exonerating the initial carrier if the goods were damaged by certain other carriers which had delivered the goods to it, was properly refused, where there was evidence tending to prove that those carriers were agents of the initial carrier.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 S.W. 13, 137 Mo. App. 133.

A requested charge, ignoring the liability of the initial carrier as an insurer for breakage occurring from any cause on the entire route if the regular rate was charged, so that there would be no consideration for a stipulation exempting it from such liability, was properly refused.—*Id.*

**App. 1910.** In an action against two carriers for negligent injuries to freight, on the theory that defendants were jointly liable because of a partnership agreement or joint undertaking for the shipment of the freight to destination, the court instructed that, to make defendants jointly liable for negligent injuries to freight en route, they must each have been common carriers, and must have agreed to associate themselves together and form, as to the shipper, a continuous line between the point of shipment and final destination on the line, of the terminal carrier; that the contract of shipment with the initial carrier was for carriage over its own and the connecting line for an agreed sum for the whole trip, which sum was divided between the two roads. *Held*, that the words "agreed to associate themselves together" were misleading, in that they were too indefinite to prescribe a test of a partnership or joint undertaking to ship the goods; not every association between carriers for through shipment being a partnership.—*Crockett v. St. Louis & H. Ry. Co.*, 126 S.W. 243, 147 Mo. App. 347.

**App. 1923.** In an action by a potato shipper for damages to shipment by delay in transportation, an instruction authorizing a verdict for plaintiff upon the finding that there was negligent delay in the carriage of

the potatoes, without regard to whether the loss was due to the delay occurring on defendant's line, defendant not being the initial carrier, was error, as in order to render the defendant liable it was necessary that the jury find as a fact that the loss occurred through defendant's fault or breach of duty while the goods were in its possession.—*Johnson v. Missouri Pac. R. Co.*, 249 S.W. 658, 211 Mo. App. 564.

Where three carriers participated in transporting a shipment of potatoes and the evidence showed unreasonable delay occurring before defendant received the shipment, it was for the jury to say whether the loss by freezing occurred through the fault or breach of duty by defendant while the shipment was in its possession.—*Id.*

**App. 1924.** Where, in shipper's action against three carriers, plaintiff, at close of his case, took an involuntary nonsuit as to two defendants, who no longer participated in the action, an instruction for plaintiff, unless "defendants" proved that "their" negligence did not produce the damage, etc., *held* not misleading, especially when a mere clerical error.—*American Fruit Growers v. Cleveland, C. & St. L. Ry. Co.*, 263 S.W. 488.

#### (J) CHARGES AND LIENS.

Statutory regulation, see ante, ¶12, 30.

#### ¶188. Rights of carrier in general.

**Sup. 1859.** If the consignee of goods refuses to receive them, the carrier may recover freight charges of the consignor for the return of the goods, if the value of the goods exceeds the amount of the freight, but not if the freight charges exceed the value of the goods; and a custom among carriers to always return goods which the consignee refuses to receive and charge return freight cannot be allowed to control.—*The Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123.

**App. 1876.** A river carrier agreed to transport goods to a point which it was without fault unable to reach because of low water, and landed the goods at an intermediate point where it endeavored to get them transported overland, but could not do so except for exorbitant rates, and at its own risk, which was very great owing to hostile Indians. The owner however succeeded in taking the goods overland to their destination. *Held*, that the carrier was not deprived of all right to compensation, but was entitled to be paid pro rata.—*Silver v. Hale*, 2 Mo. App. 557.

**App. 1904.** A railroad company contracted to carry stock from stockyards to a certain city for an agreed price, and engaged a "terminal company" to transport the stock from the stockyards to the beginning of the carrier's road. The terminal company loaded the stock in an improper car, and the carrier sent them back to be reloaded, paying extra for the extra trip. *Held*, that the shipper was not liable for this extra expense, so that the exaction of it by the railroad was a breach of its contract.—*Hendrix v. Wabash R. Co.*, 80 S.W. 970, 107 Mo. App. 127.

**App. 1917.** Estoppel is not available as a defense to action for balance of freight for interstate shipment, part of which only, through mistake in computation, was collected on delivery.—*Bush v. Keystone Driller Co.*, 190 S.W. 597, 199 Mo. App. 152.

### 189. Rates of freight.

**Sup. 1876.** Where a carrier agrees to ship stock without the price being fixed or agreed upon, a promise to pay what it was reasonably worth arises by implication of law.—*Gray v. Missouri River Packet Co.*, 64 Mo. 47.

**Sup. 1896.** The schedule of freight rates required to be established by law, and posted in stations, governs any shipment where no rate is fixed in the contract.—*Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 34 S.W. 41, 136 Mo. 177, opinion adopted by court in banc 37 S.W. 828, 136 Mo. 177.

**App. 1910.** When a shipper's contract recites that the rate charged is the "tariff rate," it is to be construed as the highest rate a carrier can charge, and such a recital will control over a recital that the rate was less than the rate charged for shipments at the carrier's risk.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

### 190. Advances for charges and expenses.

**Sup. 1857.** The usage authorizing parties transporting goods to advance to the forwarding agents the charges on such goods, and hold the consignees liable to refund the same, does not apply to charges disconnected with the cost of transportation.—*The Virginia v. Kraft*, 25 Mo. 78.

**App. 1895.** In an action to recover charges paid by defendant railroad to an elevator company for cleaning wheat and collected from plaintiff's consignee, an instruction that before there could be a verdict for defendant the jury must believe that plaintiff

directed the defendant to stop the car of wheat at the elevator to be cleaned and that it was accordingly stopped and cleaned by the elevator company before it was turned back to defendant was erroneous, for if the car was stopped on order of plaintiff to have it cleaned, and it remained until turned back to defendant by order of plaintiff, defendant had a right to assume that the service for which the charge was made had been performed.—*Armstrong v. Chicago, St. P. & K. C. Ry. Co.*, 62 Mo. App. 639.

Plaintiff, who was engaged in buying and selling wheat, entered into an agreement with an elevator company to clean, mix, and load the wheat into cars at a stipulated charge, and in so doing would order defendant railroad to stop its cars at the elevator, and when ready to forward would bill them out and the elevator would turn them back to defendant. Under this arrangement a car was delivered to the elevator by defendant and afterwards billed out by plaintiff, but the elevator company refused to deliver it to defendant until it paid its charges or obligated itself to do so. Plaintiff on inspection claimed that the wheat had not been cleaned and refused to pay the bill of the elevator company. Afterwards defendant collected such bill added to its freight charges from plaintiff's consignee. *Held*, in an action to recover such charge from defendant, that it was not defendant's duty to inspect the car before paying the charge, which was reasonable, and hence plaintiff was not entitled to recover.—*Id.*

### 191. Charges for storage.

*See explanation, page iii.*

### 192. Special contracts as to amount of charges.

**Sup. 1858.** A clerk, by mistake, in making out a dray ticket, inserted 30 cents per 100 as the rate of freight; and the shipper, when he put the goods on board, had no knowledge of the mistake. When it was discovered, he refused to pay a higher rate, and demanded the goods. The officers of the boat refused to deliver them, and transported them to their destination. *Held*, that they were entitled to only 30 cents per 100.—*Wood v. The Fleetwood*, 27 Mo. 159.

**Sup. 1917.** Where company bound itself to switch cars between industries on its line, words "on the line" refer to physical line, and it cannot be required to switch cars for agreed charge, where to do so necessitated use of tracks of another company.—*National*

**Enameling & Stamping Co. v. Granite City & M. B. L. R. Co.**, 199 S.W. 238.

**App. 1914.** In the absence of the establishment of a freight rate by the Interstate Commerce Commission the carrier and a shipper may fix rate on an interstate shipment.—**Mott Store Co. v. St. Louis & S. F. Ry. Co.**, 168 S.W. 322, 184 Mo. App. 50.

**App. 1925.** Contract by railroad company giving rates, not in accordance with statute, *held* void.—**St. Louis Southwestern Ry. Co. v. Painton**, 275 S.W. 55.

#### 192½. Rebates.

*See explanation, page iii.*

#### 193. Rights of connecting carriers.

*Iden.*, see post, 197.

**Sup. 1858.** A. purchased property at New York, and the carrier employed there agreed that it should be delivered at St. Louis for \$49.33. It was sent, by the route pointed out by the buyer, over several railroads forming one line. The last terminating at St. Louis, paid the freight charged thereon, and transported it to St. Louis, and there demanded of the purchaser the sum they had paid, with their own freight added thereto, all amounting to \$102.40. The purchaser tendered \$49.33. *Held*, that the St. Louis railroad company was entitled to recover the amount demanded as a condition precedent to delivery of the property.—**Wells v. Thomas**, 27 Mo. 17, 72 Am. Dec. 228.

**Sup. 1903.** Rev. St. 1899, §§ 1112-1115, requiring delivery by the initial carrier of freight upon any track it owns, leases, or uses, or can use, does not prevent such initial carrier from assessing a reconsignment charge for delivering a shipment upon another track than that upon which it was originally placed.—**State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.**, 75 S.W. 776, 176 Mo. 687, 63 L. R. A. 761; **State ex inf. Attorney General v. Missouri Pac. Ry. Co.**, 75 S.W. 888, 176 Mo. 718; **Same v. St. Louis, K. C. & C. Ry. Co.**, 75 S.W. 888, 176 Mo. 721.

**App. 1885.** A carrier of goods is not required to make delivery at the place of business of the consignee, but only at the carrier's depot in the city where that place of business is located, and hence after such delivery at carrier's depot a carrier cannot as connecting carrier render the consignee liable for additional charges incurred by delivering at the place of business.—**Kansas City Transfer Co. v. Neiswanger**, 18 Mo. App. 103.

**App. 1895.** Plaintiff's consignor shipped a car load of fruit, which by mistake was billed to plaintiff at a freight rate less than the published schedules allowed. The error was discovered by the final carrier, who refused to deliver to plaintiff except on payment of the full schedule rates. *Held*, in replevin for the fruit, that defendant was entitled to demand the schedule rates before surrender of the fruit, and that the mere fact that neither consignor nor consignee had personal knowledge of the contents of the schedule of freight rates would not authorize the court to enforce a contract made at a lower rate in violation of the interstate commerce law, any such contract being against public policy.—**Gerber v. Wabash Ry. Co.**, 63 Mo. App. 145.

**App. 1896.** Freight paid the initial carrier for the transportation of goods over its line covers not only the service of carriage, but also that of forwarding to a connecting carrier.—**Larimore v. Chicago & A. R. Co.**, 65 Mo. App. 167.

**App. 1902.** Where, on delivery of goods to a carrier, no instructions are given as to the route of carriage, and it sends them over a connecting line by a circuitous route, so that the charges are in excess of what they would have been if sent by the most direct line, the delivering carrier is entitled to the freight paid by it to the initial carrier.—**Glover v. Cape Girardeau, B. & S. R. Co.**, 69 S.W. 599, 95 Mo. App. 369.

**App. 1906.** Where a shipment over the lines of several carriers is not made under a through bill of lading, and the different carriers concerned in the shipment are not shown to constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may pay apparently proper transportation charges demanded by a previous carrier, or hold the property according to any lawful directions given for the enforcement of a lien for such charges, unless it has notice or knowledge that in the particular instance the charge is unlawful; and while it must act in good faith towards the consignee, it is not bound to investigate at its own trouble and expense the merits of an apparently just claim preferred by a preceding carrier.—**Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.**, 92 S.W. 714, 116 Mo. App. 214.

#### 194. Persons liable for charges.

**App. 1917.** The shipper is primarily liable under a bill of lading providing that the owner or consignee should pay the freight, and, if required, should pay it before deliv-



ery.—*Yazoo & M. V. R. Co. v. Picher Lead Co.*, 190 S.W. 387.

Consignee under bill of lading providing that he shall pay the freight, and if required should pay it before delivery, becomes liable when he accepts the shipment and pays a part of the freight.—Id.

**App. 1919.** The consignee, and not the consignor, is *prima facie* liable for the payment of undercharges of freight.—*Mobile & O. R. Co. v. Laclede Lumber Co.*, 216 S.W. 798, 202 Mo. App. 630.

There need not be an express promise on his part to pay freight charges or an implied promise arising from his acts in inducing delivery to him without payment of the charges to render a consignee liable for freight charges; the mere acceptance and removal of the goods by the consignee with knowledge that the carrier is giving up his lien for his charges being alone sufficient to create an obligation to pay such charges.—Id.

Where the consignor has agreed to deliver goods to the consignee *f. o. b.* at the place of destination, and the consignee has paid freight rates for the carriage of the same less than those fixed by law, the consignee is liable for the difference between the amount paid and the amount fixed by law, and it is immaterial that the consignor has become insolvent.—Id.

**App. 1921.** In a carrier's action against consignor for balance due for freight on an interstate shipment, defended on the ground that the carrier had agreed to collect the freight from others, to whom consignor sold the cars while in transit, it was proper to instruct that the tariffs were fixed by the Interstate Commerce Commission, and if through a mistake a lesser rate was collected the difference between such rate and the regular rate is still due and collectible from consignor.—*Chicago & E. R. Co. v. Lightfoot*, 232 S.W. 176, 206 Mo. App. 436.

The consignor of an interstate shipment is primarily liable for the payment of all the freight as fixed by the terms of the law and Interstate Commerce Commission, and when the carrier has failed to procure the payment of that freight, it can recover from the consignor, and its suit will not be defeated on account of estoppel or contract.—Id.

**App. 1923.** Where an express company ordered an undertaker to prepare and ship a body, stating that the money for the under-

taker's expenses was at the point of destination, and to ship it *C. O. D.*, and in reliance on that order the body was shipped, the undertaker was not liable for express charges on either the original shipment or for the body's return after identification proved it not to be the one for which a deposit guaranty was made by supposed relatives.—*Frank Livery & Undertaking Co. v. American Ry. Express Co.*, 247 S.W. 1031.

**App. 1923.** No estoppel can be enforced against the carrier to relieve the shipper or consignee from liability to pay the rate fixed by the regularly filed tariff under the Interstate Commerce Act (49 USCA § 1 et seq.).—*Mobile & O. R. Co. v. Southern Sawmill Co.*, 251 S.W. 434, 212 Mo. App. 117.

**App. 1926.** Consignor is primarily liable for freightage.—*Chicago, B. & Q. R. Co. v. Evans*, 288 S.W. 73, 221 Mo. App. 757.

Consignee, accepting or contracting to accept goods, is liable for freightage, if contract between parties so provides.—Id.

Consignee, who owned goods and direct transportation, is liable for freightage.—Id.

Buyer and consignee of potatoes to be shipped *f. o. b.* seller's station *held* not liable for freightage.—Id.

Consignee *held* not liable for freightage, in absence of agreement.—Id.

Ownership of property is not test of liability for freightage.—Id.

#### 195. Payment or tender.

**App. 1907.** The right of a common carrier to prepayment of its charges is waived if it accepts the goods for transportation without exacting such payment in advance, and liability attaches as though the freight were actually prepaid.—*Gratiot Street Warehouse Co. v. Missouri, K. & T. Ry. Co.*, 102 S.W. 11, 124 Mo. App. 545.

**App. 1908.** Where consignee tendered freight charges, but failed to keep such tender good by deposit in court, he was without right to possession of the property shipped.—*Robbins v. Chicago & A. Ry. Co.*, 111 S.W. 1179, 132 Mo. App. 306.

#### 196. Actions for charges.

**Sup. 1834.** In an action by the carrier of goods to recover freight, defendant cannot recover by way of set-off as for goods sold

and delivered, the value of goods not delivered.—*Johnson v. Strader*, 3 Mo. 359.

**App. 1876.** In an action by a river carrier for freight charges in which the defense was failure to deliver the goods at their destination, evidence that because of low water no boat reached the point of destination during the season was proper.—*Silver v. Hale*, 2 Mo. App. 557.

**App. 1909.** A petition by a carrier to recover transportation charges advanced by it to the initial carrier, its own charges and charges advanced to the final connecting carrier, alleging that defendant requested plaintiff carrier to forward the cars over its and connecting lines, and directed plaintiff to pay the charges and promised to repay the sums so paid out, declared on an express contract as to a promise to repay plaintiff but not as to the amounts of the charges to be paid and it was not error to allow plaintiff to prove that the charges paid to the other carriers and its own were reasonable.—*Chicago, P. & St. L. Ry. Co. v. Bay Shore Lumber Co.*, 119 S.W. 973, 140 Mo. App. 52.

**App. 1921.** A petition by a carrier against a consignee for freight was demurrable where it did not allege that defendant was a party to the contract of transportation or had received or accepted the freight; the relation of carrier and consignee not being sufficient, and ownership of goods not being determinative.—*Chicago, B. & Q. R. Co. v. Evans*, 228 S.W. 853, 206 Mo. App. 553.

**App. 1921.** In a carrier's action against consignor for balance due on freight, plaintiff's instruction, fixing the property as being shipped from Missouri to New York, *held* not to have misled the jury, where the evidence clearly showed the whole transaction, and that some of the cars were shipped from Chicago, and only one from Missouri.—*Chicago & E. R. Co. v. Lightfoot*, 232 S.W. 176, 206 Mo. App. 436.

#### 196 1/2. Actions for rebates.

**Sup. 1887.** Where, in an action against a railroad company to recover rebate, the evidence tended to show that the sum claimed had been received by the company, that when previous to the institution of the suit plaintiff presented defendant with a bill showing the amount claimed and demanded repayment, and such payment was resisted on the ground that no such contract as plaintiff set up had been made, an instruction was not improper that the jury, from the fact that defendant

resisted the claim of plaintiff for repayment on the sole ground that no such contract as he set up had been made, might infer that the amounts claimed to have been paid had been received by the defendant.—*Christie v. Missouri Pac. Ry. Co.*, 7 S.W. 567, 94 Mo. 453.

**Sup. 1888.** In an action for a rebate, which, it was alleged, defendant agreed to allow plaintiff on freight shipped over its line, where it does not appear that this concession was made to plaintiff exclusively, it is not error to overrule defendant's motion to exclude all testimony on the part of plaintiff on the ground that the contract is against public policy, and in violation of Const. art. 12, §§ 12, 23, and Rev. St. 1879, § 821, which provide that no railroad company shall make any discrimination in favor of any persons by abatement, drawback, or otherwise.—*Christie v. Missouri Pac. Ry. Co.*, 7 S.W. 567, 94 Mo. 453.

**App. 1886.** Where, in an action against a railroad to recover rebates due plaintiff on freight shipped by him under a contract with defendant, it was alleged that the contract continued for a specified space of time, it was not necessary to allege for what length of time the contract was to continue.—*McNees v. Missouri Pac. Ry. Co.*, 22 Mo. App. 224.

In an action against a railway to recover for rebates on freight shipped by plaintiff under a contract with defendant, it being alleged that the contract applied to certain stations named in the petition, it was immaterial whether it applied to any other stations.—*Id.*

In an action by plaintiff to recover from defendant railway rebates on freight shipped by plaintiff under a contract with defendant whereby plaintiff was to pay the regular tariff rates and receive rebates computed on the number of hundred pounds of grain shipped, it was not necessary for plaintiff to allege the number of car load lots shipped.—*Id.*

In an action against a railway for rebates, which it agreed to give plaintiff on freight shipped by him, it was not necessary to allege in the petition that the contract was made by defendant through his agent, or who the agent was; an allegation that defendant made the contract being sufficient.—*Id.*

In an action on a contract whereby defendant railway agreed to give plaintiff rebates on freight shipped by him, it was not necessary for the petition to allege whether the contract was verbal or written.—*Id.*

In an action to recover from a railroad company rebates on freight shipped by plaintiff under a contract with defendant whereby the plaintiff was to pay the regular tariff rates and receive a rebate, there was but one cause of action stated, though the petition set out various shipments from different stations.—*Id.*

In an action to recover from a railway company rebates on freight shipped by plaintiff under a contract with defendant, it being alleged that the freight was all shipped between specified dates, there was no necessity for any greater particularity in the allegations as to the dates of shipment.—*Id.*

In an action against a railway for rebates which it agreed to give plaintiff on freight shipped by him, it was not necessary to allege in the petition that the contract was made by defendant through his agent, or who the agent was, an allegation that defendant made the contract being sufficient.—*Id.*

## 197. Lien for charges.

### 197 (1). Right to lien in general.

**App. 1900.** The right of a carrier to retain possession of horses until his charges are paid extends to small articles in the nature of trappings, although no charge was made for the transportation of such articles.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

**App. 1906.** It is only for charges connected with the transportation of property and essential to its conveyance from the point of shipment to destination that the carrier may assert a lien.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.*, 92 S.W. 714, 116 Mo. App. 214.

**App. 1908.** A carrier has a lien on goods shipped for its freight charges.—*Robbins v. Chicago & A. Ry. Co.*, 111 S.W. 1179, 132 Mo. App. 306.

**App. 1911.** Every common carrier has a lien upon the goods carried for compensation, and may withhold them until the freight charges are paid.—*Sutton v. St. Louis & S. F. R. Co.*, 140 S.W. 76, 159 Mo. App. 685.

**App. 1915.** A private carrier has no lien for his charges upon goods transported.—*Campbell v. A. B. C. Storage & Van Co.*, 174 S.W. 140, 187 Mo. App. 565.

A common carrier has a lien on goods transported to secure payment of his lawful charges.—*Id.*

An allegation in defendant's answer *held* sufficient to entitle it to put in evidence to show that it was a common carrier in fact, and so entitled to a lien for charges on goods transported.—*Id.*

**App. 1917.** A carrier may lawfully refuse to deliver goods until all the transportation charges are paid.—*Yazoo & M. V. R. Co. v. Picher Lead Co.*, 190 S.W. 387.

### 197 (2). Goods carried without authority.

*See explanation, page iii.*

### 197 (3). Extent of lien.

**App. 1913.** A carrier has a lien on goods for their carriage and for such advances as it has been required to make for the owner in order to further their transportation to destination.—*Woolston v. Southern Ry. Co.*, 160 S.W. 1023, 177 Mo. App. 611.

### 197 (4). Priority of lien.

*See explanation, page iii.*

### 197 (5). Lien of connecting carrier.

**App. 1885.** A connecting carrier has a right to receive from the initial carrier goods which the former can transport nearer to their destination than can the latter, and may also pay back charges thereon for which as well as its own freight charge it will have a lien on the goods.—*Moore v. Henry*, 18 Mo. App. 35.

A connecting carrier which has paid the charges of the initial carrier on receiving the goods has a lien for such charges as well as its own.—*Id.*

**App. 1898.** Where certain goods were shipped by steamboat to a point where the shipment was continued by a railroad company, the failure of the railroad company to note the charge of the steamboat company on its bill of lading did not deprive a subsequent connecting carrier of its lien for the steamboat company's charges which it had paid on receiving the goods.—*Evans v. Chicago & A. Ry. Co.*, 76 Mo. App. 472.

Each succeeding carrier of goods is authorized to pay the reasonable freight charges of the preceding carriers, and entitled to be subrogated to their right of lien.—*Id.*

Where goods were shipped by water to a point where the shipment was continued by a railroad company, the issuance of a new bill of lading by the railroad company at the point where it received the goods did not break the line of shipment so as to prevent a subsequent

carrier from obtaining a lien for the charges of the carrier by water which the railroad company had advanced on receiving the goods.—*Id.*

**App. 1900.** Where a carrier contracts to carry plaintiff's horses over its line to a certain point and there deliver them to a connecting carrier to be carried to their destination, and plaintiff prepaid the entire charges to the first carrier, and such carrier delivers the horses to the connecting carrier without the information that its charges had been paid, the connecting carrier, if it had no knowledge of the payment of its charges, might demand such charges from plaintiff and retain the animals until they were paid, or until it had an opportunity to ascertain whether its charges had been paid.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

**App. 1901.** Where goods were shipped in bond from Yokohama with a customs clearance indorsed by the consul general there, showing that the entry of the goods was to be made at the port of St. Louis, so that the goods were entitled to direct transportation to the port of St. Louis, as provided by Rev. St. U. S. § 3102, but were diverted to the port of St. Paul by the railroad which first received them, for its own convenience, and there opened and import dues imposed, and paid by the railroad, and included in the waybill, a connecting carrier, to which the goods were delivered and which paid the customs duties without any knowledge of the diversion, could not enforce any lien on them by withholding possession from the consignee until payment of such dues.—*Pearce v. Wabash R. Co.*, 89 Mo. App. 437, reversed *Wabash R. Co. v. Pearce* (1904) 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

A carrier may pay to a connecting carrier charges that the latter has paid, and retain possession of the goods for its reimbursement, where the advance charges were such as were incident to the transportation of the goods and were necessary to be paid in order to continue them in transit, such as freight and warehouse charges and charges for liens created by law or by the owner, for the non-payment of which the transit of the goods has been stopped or their possession withheld from the carrier; but such payment of lien in order to continue transportation is not obligatory on the carrier, and if made without the consent of the owner is at its risk.—*Id.*

#### 197 (6). Waiver or discharge.

**Sup. 1903.** The lien of a railroad for freight on goods shipped ceased when the

company attempted to assign said lien to one who seized the goods for the debt of a stranger, and therefore the assigned lien was no defense to an action for conversion by the consignor against the attaching creditor.—*Rosenkranz v. Swofford Bros. Dry Goods Co.*, 75 S. W. 445, 175 Mo. 518, 97 Am. St. Rep. 609.

**App. 1902.** Action of a railroad company in switching cars containing lumber onto a switch on private land of which the consignee was tenant, for the purpose of allowing them to be unloaded, did not operate to deprive it of dominion over the cars or over the lumber remaining therein, and did not preclude it from repossessing itself of the cars and lumber for the purpose of enforcing a lien on the lumber.—*Harrington v. Missouri Pac. Ry. Co.*, 72 S.W. 122, 99 Mo. App. 1.

#### 197 (7). Enforcement.

**App. 1920.** Where express company notified owner on October 20th that his goods were held at his risk and would be sold at public auction if disposition was not given by November 16th, and on November 11th the owner acknowledged receipt of the notice and requested the express company to deliver the goods to him, and on November 13th the express company wrote the owner that the goods had been shipped to another point, and on November 23d that they had been sold, the express company was liable in conversion.—*Buften v. Southern Express Co.*, 217 S.W. 630.

### (K) DISCRIMINATION AND OVERCHARGE.

Baggage of passenger, see post, 405.  
Interstate transportation, see ante, 32.  
Statutory regulations, see ante, 13.

#### 198. Rights and liabilities of carrier in general.

See explanation, page iii.

#### 199. Unlawful discrimination.

Waiving violation of contract, see ante, 32(2).

**Sup.** At common law, only unjust discriminations by carriers are condemned.—(1910) *McGrew v. Missouri Pac. Ry. Co.*, 132 S.W. 1076, 230 Mo. 496; (1914) *Id.*, 166 S.W. 1033, 258 Mo. 23.

**Sup. 1912.** A railroad company is bound to permit any express company to operate on its lines.—*State ex inf. Attorney General v. Missouri Pac. Ry. Co.*, 144 S.W. 863, 241 Mo. 1.

Consult Pocket Part for later cases. For explanation, see page iii.

**App. 1884.** Three lines of railway from the west leading into the city of New York held a meeting with the object of a uniform adjustment of rates on live stock. It was considered essential that each of the three roads should do a certain percentage then agreed on of the entire carrying trade under consideration. In order to effect this, an arrangement was agreed on between the roads and third persons whereby the latter were to secure such a division of the shipments of live stock from the west as would give to each of the roads its proper share of the entire trade. In order to perform their part in the agreement it might be necessary from time to time for the third persons to make special purchases and shipments of stock so as to make up any deficiency that might appear in the proportionate amount of business done by either one of the roads. As compensation for the services rendered by the third persons they were to receive a percentage of all the stock shipments made on the three roads, whether by themselves or by others. *Held*, that the compensation agreed on between the roads and the third persons was not in the nature of a discrimination in their favor.—*Rothschild v. Wabash R. Co.*, 15 Mo. App. 242.

**App. 1886.** A contract by a railway company with a shipper whereby it was agreed that he was to pay the regular tariff rates and then receive a rebate on every 100 pounds shipped was not within the prohibition of the common law against any distinction or discrimination being made by a common carrier in favor of one against another.—*McNees v. Missouri Pac. Ry. Co.*, 22 Mo. App. 224.

**App. 1911.** Regardless of statute, carriers cannot maintain unreasonable regulations for receipt and transportation of freight.—*Warner v. St. Louis & S. F. R. Co.*, 137 S.W. 275, 156 Mo. App. 523.

The reasonableness of a railway company's regulation governing receipt or transportation of freight must be determined under consideration of the whole system, and not as to one station or community.—*Id.*

Railway regulations providing one train a day to carry live stock, and providing for running through trains from division points, is not unreasonable as to shippers at a point where the train is scheduled to leave at 6:47 a. m.; it appearing to be required for proper accommodation of the whole system's traffic.—*Id.*

#### 200. Excessive charges.

**App. 1903.** Where, by a traffic arrangement between a standard-gauge railroad and a connecting narrow-gauge line, shipments of goods over the narrow-gauge line and then over the standard-gauge were charged for by the standard gauge at the rate of three narrow-gauge cars to two standard-gauge ones, and a shipper of cattle over the lines (the carriage commencing on the narrow-gauge road) knew of such agreement, he was not charged in excess of the tariff rates, though, owing to the manner in which the cattle were loaded in the narrow-gauge cars, the broad-gauge railroad found that it could and did place the cattle in a less number of standard-gauge cars than he had received for.—*Carlisle v. Missouri Pac. Ry. Co.*, 71 S.W. 475, 97 Mo. App. 571.

**App. 1923.** If a carrier fails to desist from charging a rate which the Interstate Commerce Commission has held to be excessive, the shipper, or person injured, may recover.—*Mobile & O. R. Co. v. Southern Sawmill Co.*, 251 S.W. 434, 212 Mo. App. 117.

#### 201. Actions for discrimination.

Actions for penalties, see ante, 19, 20. Proceedings to enforce statutory regulations, see ante, 18.

**Sup. 1887.** In an action to recover damages resulting from defendant's discrimination between plaintiff and other shippers, it appeared that plaintiff's cattle were shipped over the line of several connecting carriers. *Held*, that plaintiff could not recover, in the absence of proof that defendant was a party to the discriminating agreement.—*Rothschild v. Wabash, St. L. & P. R. Co.*, 4 S.W. 418, 92 Mo. 91.

In an action by a shipper to recover damages resulting from discrimination between plaintiff and other shippers, plaintiff testified that the rate was made by a person who was the agent of a road other than defendant's and that the stock was shipped on the "Wabash Railway," leaving it uncertain whether he shipped it with defendant "Wabash Railway Company" or with the "Toledo, Wabash & W. Ry. Co." *Held*, that the evidence was insufficient to show that plaintiff's cattle were shipped over defendant's line.—*Id.*

**Sup. 1893.** In an action against a carrier for willfully discriminating against plaintiff in shipments of coal, plaintiff failed to prove actual shipments at discriminating rates over a longer distance during the months in which his coal was transported

over a shorter distance, but did prove that they were made before and afterwards. *Held*, that this evidence was properly admitted as tending to show that plaintiff was damaged.—*Seawell v. Kansas City, Ft. S. & M. R. Co.*, 24 S.W. 1002, 119 Mo. 222.

Where plaintiff shipped coal over defendant's railroad from C. to K., the rates charged being greater than rates advertised on the same date for shipments of coal over defendant's road in the same direction from M. to K., a greater distance, his measure of damages is the extent to which shippers of coal from M., under similar circumstances, were given a preference.—*Id.*

**Sup.** Const. 1870, art. 12, § 12 (Ann. St. 1906, p. 306), making it unlawful for any railroad company to charge for freight or passengers a greater amount for the transportation thereof for a less distance than the amount charged for any greater distance, and providing that suitable laws shall be passed to enforce the provision, being self-enforcing, the measure of damages for violation thereof, in the absence of statute, would be the amount of the excess charged for the shorter distance over that charged for the longer distance.—(1910) *McGrew v. Missouri Pac. Ry. Co.*, 132 S.W. 1076, 230 Mo. 496; (1914) *Id.*, 166 S.W. 1033, 258 Mo. 23.

The question whether a discrimination by a carrier is unjust is for the court to decide.—*Id.*

**App.** 1901. Plaintiff brought an action against defendant on five separate causes of action set forth in five counts. The second and fifth counts were based on Rev. St. 1889, § 2636, which declares it to be unlawful for a common carrier to give one person any undue or unreasonable advantage or preference, or subject any person to an unreasonable prejudice or disadvantage. Said counts charged that defendant gave to a certain shipper an advantage over plaintiff in the shipment of coal in the way of better rates. The third and fourth counts were based on Rev. St. 1889, § 2637, which makes it unlawful for a common carrier to charge for the same kind of property a greater sum for a short distance than is charged for a longer distance. Said counts alleged that defendant violated said statute in shipments made by plaintiff wherein he was charged a greater sum for a shipment than was another shipper for a shipment to a greater distance than plaintiff's shipment. Plaintiff sought judgment for \$1,000 on all four counts, as provided for by Rev. St. 1889, § 2663, and his

prayer for relief was to the effect that he was aggrieved in the premises, and that a cause of action had accrued to him to demand and sue for the sum of \$1,000 and costs of suit for such offense, and prayed judgment for such sum of \$1,000 in costs according to the statute in such cases made and provided, and for all other and general relief to which he might be entitled. The provisions of the statute upon which the action was based were carried forward into the Revision of 1889, from Extra Sess. Acts 1887, p. 16, § 3, which said act also provided as a penalty for the violation of its provisions treble damages sustained as well as an attorney's fee. *Held*, that plaintiff should have sought his recovery under said section of said Sess. Acts, and not under the provisions of section 2663.—*McGrew v. Missouri Pac. Ry. Co.*, 87 Mo. App. 250.

#### ← 202. Actions for excess of charges paid.

Actions for penalties, see ante, ← 19, 20.

**Sup.** 1915. Passengers and shippers, including the state in its private capacity, after determination of the validity of state statutes fixing rates for intrastate transportation by rail, in proper actions could recover excessive charges exacted pending determination.—*State ex rel. Barker v. Chicago & A. R. Co.*, 178 S.W. 129, 265 Mo. 646, L. R. A. 1916C, 309.

The state, suing a railroad to recover excess charges pending determination of the validity of intrastate rate statutes, could not join as parties plaintiff private shippers and passengers likewise aggrieved.—*Id.*

The state, suing a railroad by its Attorney General, could not have an accounting to impound, for individual shippers and passengers, charges collected from them, excessive under state statutes fixing rates for intrastate transportation, pending determination of the validity of the statutes.—*Id.*

**Sup.** 1917. Freight charges collected in excess of Rev. St. 1909, §§ 3241, 3242, prescribing maximum freight rates, may be recovered after dissolution of the federal injunction against the statute's enforcement.—*White v. Delano*, 191 S.W. 1012, 270 Mo. 16.

In an action to recover freight charges collected in excess of those prescribed in Rev. St. 1909, §§ 3241, 3242, defendant carrier must charge against the shipper only the amount it paid a terminal company for switching delivery regardless of what the terminal company might have charged under the statute.—*Id.*

**Sup. 1920.** A coal mining company, which shipped to customers, instead of f. o. b. at the mine, f. o. b. at destination, so that the customers paid the freight and remitted the railroad's receipt for freight paid with the balance of the price in cash, was injured in contemplation of law by the railroad's exaction of an illegal charge, under the long and short haul provision of the Constitution (article 12, § 12), and can maintain suit under statute to recover the illegal overcharge.—*McGrew Coal Co. v. Missouri Pac. Ry. Co.*, 217 S.W. 984, 280 Mo. 466, 13 A. L. R. 283, judgment affirmed *Missouri Pac. R. Co. v. McGrew Coal Co.* (1921) 41 S. Ct. 404, 256 U. S. 134, 65 L. Ed. 864.

The long and short haul provision of Const. art. 12, § 12, being self-enforcing, liquidates the amount of the overcharge by the carrier at the difference between the charge exacted and paid for the shorter haul and the rate charged for the longer haul, and, if wrongfully exacted and paid, is necessarily the amount to be recovered back.—*Id.*

**Sup. 1921.** On bill of interpleader against defendants asserting conflicting claims for overcharges exacted by a railroad for carrying certain ties, evidence *held* to warrant the referee in finding that one defendant bought the ties as agent for another defendant after, as well as before, expiration of a contract between them, and paid all the freight charges on the ties bought by it prior to the appointment of receivers for the railroad which carried the ties.—*Cobbs v. Joyce-Watkins Co.*, 228 S.W. 504, 287 Mo. 39.

A company, which was in fact both consignor and consignee of ties purchased by another company as its agent, bore the burden of transportation of such ties, and as against the other company, its agent, is entitled to recover overcharges for the transportation from the railroad which carried the ties.—*Id.*

**Sup. 1921.** Persons having claims against a railroad company for overcharges on different shipments, unlike as to places or times of execution of the contracts, or of performance of the duties imposed, cannot join in a suit in equity to impress a trust on the assets and capital stock of the company in the hands of a reorganized company, to prevent a multiplicity of suits or otherwise.—*Ballew Lumber & Hardware Co. v. Missouri Pac. Ry. Co.*, 232 S.W. 1015, 288 Mo. 473.

**App. 1889.** Rev. St. § 835, provided that in case of overcharge by a carrier the party

injured shall be entitled to recover three times the amount taken or received from him in excess of the rate prescribed by the act. *Held*, that such action was an action to recover a statutory penalty and as such was barred by the three-year statute of limitations.—*Young v. Kansas City, St. J. & C. B. Ry. Co.*, 33 Mo. App. 509.

**App. 1895.** Where it did not appear that shipments on which overcharges had been repaid were under bills of lading similar to those under which the shipments were made on which the overcharges sued for were made, the admission of evidence of such repayments was erroneous.—*Holtz v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 204.

**App. 1895.** In an action to recover from defendant railroad a charge paid by it to an elevator company for cleaning a car of wheat and collected from plaintiff's consignee, an instruction was given that if plaintiff shipped the car of wheat over defendant's railroad under a bill of lading which fixed a charge of 14 cents per 100 pounds, and defendant collected from plaintiff or his agents a sum in excess of such rate, and neither plaintiff nor his agents empowered or instructed the defendant to stop the car of wheat and have it cleaned, and did not direct the elevator company to clean the wheat, plaintiff was entitled to recover the amount so paid. *Held*, that such instruction was erroneous in requiring the jury to determine the legal effect of a bill of lading.—*Armstrong v. Chicago, St. P. & K. C. Ry. Co.*, 62 Mo. App. 639.

*Held*, that such instruction was erroneous in submitting the question whether plaintiff directed the elevator company to clean the wheat, such fact being undisputed.—*Id.*

**App. 1905.** In an action against a railroad for overcharges on a shipment of "ties" which it was claimed defendant had, by a special agreement to carry "lumber," contracted to carry at a certain rate, an opinion of the Interstate Commerce Commission to the effect that ties should be put in the same classification as lumber was irrelevant and prejudicial.—*Greason v. St. Louis, I. M. & S. Ry. Co.*, 86 S.W. 722, 112 Mo. App. 116.

Where a petition against a railroad for overcharges on a shipment of ties counted on a special agreement on defendant's part to carry lumber at a given rate, and alleged that ties were covered by the definition of lumber, and included among the articles mentioned in the railroad's tariff sheet as hauled for the freight rate on lumber, there could be

no recovery, except for a breach by the railroad of the specific agreement relied on; and while the tariff sheet might aid plaintiff, by indicating that the railroad officials embraced ties in the word "lumber," when used by them in public statements of freight rates, yet a recovery could not be had on that ground.—*Id.*

**App. 1905.** Evidence in a suit by a consignee for the recovery of overcharges of freight, due to excessive weight of lumber shipped to consignee, examined and *held* to support a finding for plaintiff.—*Chicago Lumber & Coal Co. v. Georgia Southern & F. Ry. Co.*, 89 S.W. 576, 114 Mo. App. 327.

**App. 1912.** Where the initial carrier turned over the shipment to the connecting carrier without requiring advancement of the accrued freight, and the connecting carrier, asserting the lien of both, collected an excessive charge, the initial carrier is liable for the excess, though the connecting carrier retained it.—*Dunne & Grace v. St. Louis & S. W. Ry. Co.*, 148 S.W. 997, 166 Mo. App. 372.

**App. 1912.** In an action against a carrier to recover overcharge on an interstate shipment, proof that a less rate than that charged was agreed on and inserted in the bill of lading *held* to establish a prima facie case.—*Hunter v. St. Louis & S. F. R. Co.*, 150 S.W. 733, 167 Mo. App. 624.

In order to establish an interstate freight rate, under the Interstate Commerce Act as it stood in 1908, for a particular station, the burden was on the carrier to show that the printed schedule containing the rate and filed with the Interstate Commerce Commission had been furnished to the agent in charge of the particular station.—*Id.*

**App. 1919.** Where the purchaser of machinery shipped it to another point, and paid claims charged against it by the carrier for storage, prior to the purchase, and took such sum out of the purchase price, the seller cannot recover against the carrier, the storage charge being unfounded; there being no wrongful act against plaintiff which was the proximate cause of the damage.—*Luck Const. Co. v. Chicago & A. R. Co.*, 207 S.W. 840, 200 Mo. App. 450.

**App. 1922.** In an action involving an issue as to whether plaintiff or an interpleader defendant was entitled to recover overcharges on shipments of railroad ties by defendant to plaintiff, evidence *held* to prove that such defendant purchased and shipped ties to plaintiff as plaintiff's agent, and that

plaintiff paid the freight.—*Joyce-Watkins Co. v. P. R. Walsh Tie & Timber Co.*, 236 S.W. 1105.

Where agent purchased and shipped railroad ties to principal who paid freight thereon, the principal, and not the agent, was entitled to recover the excess freight charges.—*Id.*

Where agent purchased and shipped railroad ties to principal, who paid freight charges, and where goods were not shipped in the name of the sellers, the principal, and not the sellers, was entitled to recover excess freight charges.—*Id.*

**App. 1925.** Allegations of negligent failure to reconsign goods and notify consignee thereof *held* supported by evidence.—*Buschow Lumber Co. v. Union Pac. R. Co.*, 276 S.W. 409, 220 Mo. App. 743.

Cause for delay in transportation, unexplained by carrier, must be shown.—*Id.*

Allegation of overcharge for demurrage and freight *held* sustained by evidence.—*Id.*

Finding that carrier allowed cars to remain at original consignment point without consignee's knowledge *held* supported by evidence.—*Id.*

Deficiency in consignee's proof of overcharge *held* cured by carrier's evidence.—*Id.*

**App. 1928.** Freight rate lawfully published by agent of carriers *held* rate applicable to gasoline shipments, entitling purchaser to recover overcharges from seller.—*Greenslade Oil Co. v. Roxana Petroleum Corporation*, 6 S.W.(2d) 1020.

### III. CARRIAGE OF LIVE STOCK.

Contracts limiting time to sue, see post, ←218.

Contributory negligence of person accompanying shipment of live stock, see post, ←331(3).

Penalties for violation of regulations, see ante, ←19, 20.

Regulation of conduct of business, see ante, ←11.

Regulation of interstate transportation, see ante, ←23-38.

Who are common carriers, see ante, ←4.

### ←203. What law governs.

**App. 1911.** Under Code Iowa, § 2074, providing that no contract shall exempt any carrier from the liability existing had no



contract been made, a contract containing a stipulation executed in Iowa for transportation of live stock from a point in Iowa to a point in Missouri, which requires notice of a claim for loss within a specified time, is governed by the law of Iowa.—*McKinstry v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 1061, 153 Mo. App. 546.

**App. 1915.** The validity of stipulations in contract for an interstate shipment are not to be determined by the law of any state.—*Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639.

**App. 1919.** A case involving a live stock shipping contract executed and fully performed wholly in a particular state is governed and controlled by the laws and decisions of such state.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S.W. 404.

**App. 1924.** Rights and liabilities of parties growing out of interstate shipment depend on acts of Congress, contract between parties and common-law principles accepted and applied by federal courts.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

#### 204. Statutory regulation.

**Sup. 1892.** Rev. St. 1889, §§ 2598–2600, which require railroad companies to furnish double-decked cars for carrying sheep when requested, and provide a penalty for refusal to do so, are constitutional, being a proper regulation of common carriers.—*Emerson v. St. Louis & H. Ry. Co.*, 19 S.W. 1113, 111 Mo. 161.

**Sup. 1908.** The state may require carriers to furnish cars of a certain kind to alleviate the sufferings of live stock in transit.—*George v. Chicago, R. I. & P. Ry. Co.*, 113 S.W. 1099, 214 Mo. 551, 127 Am. St. Rep. 690.

**App. 1916.** The rights and liabilities of parties to an intrastate shipment of hogs by rail are covered by the Public Service Commission Act.—*Hull v. Chicago Great Western R. Co.*, 185 S.W. 1155, 193 Mo. App. 425.

#### 205. Nature of carrier's duties and liabilities in general.

**App. 1876.** A carrier in transporting live stock takes upon itself all the liabilities of common carriers.—*Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

**App. 1903.** Delivery of live stock to a carrier is complete, so that its liability as such attaches, where the shipper applies to the carrier's freight agent for transportation,

and, at his direction, places the animals in the usual place for receiving them for shipment; the agent being then notified thereof, and taking directions for their shipment.—*Lackland v. Chicago & A. Ry. Co.*, 74 S.W. 505, 101 Mo. App. 420.

**App. 1904.** The liability of a railway company in the transportation of animals is the same as that of a common carrier respecting other property, except as to injuries resulting from the natural propensities of the animal.—*Keyes-Marshall Bros. Livery Co. v. St. Louis & H. Ry. Co.*, 80 S.W. 53, 105 Mo. App. 556.

**App. 1906.** The common-law liabilities imposed on common carriers are applicable to interstate shipments of live stock.—*Ficklin v. Wabash R. Co.*, 93 S.W. 847, 117 Mo. App. 221.

**App.** Carriers of live stock, as of other freight, are liable absolutely for loss of, or injury to, stock intrusted to them for transportation, unless occasioned by act of God, the public enemy, negligence of the shipper, or the natural propensities of the animals.—(1909) *Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276; (1915) *Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746, 191 Mo. App. 676; *Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233, 191 Mo. App. 710; (1917) *Baker v. Bush*, 194 S.W. 1061.

**App. 1910.** When live stock is placed in the carrier's pens prepared for shipment, the relation of shipper and carrier begins at the time the carrier's agent receives notice that the stock is in the pens.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1911.** That live stock was partly loaded and the remainder placed in the carrier's pens shows delivery to it.—*Moss v. Missouri, K. & T. Ry. Co.*, 134 S.W. 1070, 153 Mo. App. 602.

**App. 1912.** A carrier handling a shipment of live stock in the usual and ordinary course of business complies with the law.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 1199, 164 Mo. App. 444, adopting opinion (1911) 134 S.W. 665, 154 Mo. App. 420.

**App. 1913.** An act of God does not excuse nonperformance by a carrier contracting absolutely to transport live stock.—*Vivion v. Chicago & A. Ry. Co.*, 157 S.W. 971, 172 Mo. App. 352.

**App. 1915.** When live stock is delivered to a carrier for transportation, its liability

commences when the stock is delivered to it at its stock pens or warehouses for shipment.—*Hardesty v. Atchison, T. & S. F. Ry. Co.*, 179 S.W. 725.

**App. 1910.** At common law negligence is not necessary to render a carrier liable for injury to live stock during shipment, as the carrier is an insurer.—*Boyd v. St. Louis Express Co.*, 211 S.W. 702.

**App. 1920.** The carrier being an insurer is liable for death of a hog in transit unless it died from its own inherent weakness or vice.—*Burgher v. Wabash Ry. Co.*, 217 S.W. 854.

**App. 1922.** A common carrier is liable for failure to safely and properly deliver live stock, regardless of negligence, its duty being the same with respect to live stock as to inanimate freight, with the exception that as to live stock it is not liable if failure to properly or safely deliver was due to act of God, public enemy, inherent vice or nature of the animal, its vicious propensities, or to the fault of the shipper.—*Sullivan v. American Ry. Express Co.*, 245 S.W. 375, 211 Mo. App. 123.

A live stock carrier is not liable if its failure to properly and safely deliver in good condition was due to the act of God, the public enemy, the inherent vice or nature of the animal, or its vicious propensities, or the fault of the shipper.—*Id.*

**App. 1922.** An interstate carrier of live stock is liable, not only for losses occasioned by its negligence, but also as an insurer.—*Johnson v. American Ry. Express Co.*, 245 S.W. 1071.

**App. 1928.** Carrier was charged with duty of delivering car of animals in good condition or to explain failure to do so.—*Morrow v. Wabash Ry. Co.*, 6 S.W.(2d) 628.

#### 206. Duty to receive for transportation.

**Sup. 1876.** A railroad company which had received plaintiff's hogs into its pens for transportation could not avoid liability for injury received by such hogs from the cold weather which prevailed at that time, on the ground that owing to the demands of the government on its rolling stock in transporting its war materials the company was unable to perform its contract of shipment.—*Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

If from insufficiency of rolling stock, owing to the demands of the government in time of war, a railroad company is likely to be

unable to transport live stock offered to it for transportation, it should unreservedly refuse to receive the stock, and if its agent merely advises the shipper to retain the stock for a while, and thereafter holds out the hope that rolling stock will soon be available, the company is liable for injuries to the stock from the weather which it could have avoided by a timely refusal.—*Id.*

A railroad company is chargeable with notice of an unprecedented increase of live stock in a particular year, and having such notice it is bound to provide rolling stock sufficient to enable it to expeditiously handle the business which its agents have accepted.—*Id.*

**Sup. 1923.** Where it was shown that three or four days was the time usually allowed for placing of cars for live stock shipments, an order for cars on November 12 for use on November 18 was made within a reasonable time.—*Howell v. Hines*, 249 S.W. 924, 298 Mo. 282.

**App. 1885.** A railroad company is bound to anticipate that its stock pens will be in a muddy condition in the month of December, and for injury to cattle caused by delay in moving them from the pen for transportation it will be held liable.—*Armstrong v. Missouri Pac. Ry. Co.*, 17 Mo. App. 403.

**App. 1887.** Where cattle have been put in pens in obedience to the contract of shipment and the directions of the carrier preparatory to their transportation, the delivery for shipment is complete, and the carrier's responsibility begins.—*Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473.

Where a carrier provides stock pens as a means of receiving at its stations live stock for shipment, it is liable for the defective condition of such pens which results in damage to the shipper, who has placed his cattle therein in obedience to the contract for shipment and the directions of the carrier.—*Id.*

**App. 1889.** Plaintiff, who desired to ship a horse over defendant's railroad, applied to the agent at the point of shipment, and was told that the agent would have a car ready the next day at the stock pens and chute, where the horse could be loaded and shipped. Plaintiff brought the horse, and together with his own men passed the horse through a chute, when the same gave way and the horse was injured. *Held*, that defendant was bound to provide a reasonably safe chute, and was

liable for its negligence.—*McCullough v. Wabash Western Ry. Co.*, 34 Mo. App. 23.

**App. 1894.** Where a railroad company constructs stockyards for the receiving of stock preparatory to shipment, its liability as a carrier attaches at the time of delivery of the cattle in the stockyards, and hence it is bound to keep such stockyards in a reasonably safe and secure condition, and is liable for the damages caused by its failure to do so.—*Cooke v. Kansas City, Ft. S. & M. R. Co.*, 57 Mo. App. 471.

**App. 1895.** Where the petition in an action for damages for failure to ship cattle alleged a verbal contract on the part of defendant to furnish cars and receive and ship certain cattle on a certain day, an answer setting up that by reason of the falling of a deep snow and a severe, extreme, unforeseen storm arising it was impossible to furnish the cars and receive and ship the cattle on such days, was properly struck out, it not being a valid defense; the contract being without qualification or limitation.—*Miller v. Chicago & A. Ry. Co.*, 62 Mo. App. 252.

**App. 1895.** Plaintiffs, desiring to ship stock over defendant's railroad, requested a certain number of stock cars to be delivered at two small stations the next day, and on the next morning after defendant's trains had left the supply stations for such cars plaintiffs requested additional cars to be left at one of the stations. This defendant attempted to do, but failed on account of lack of such cars at hand, leaving an additional car at one station and one less than the required number at the other. Plaintiff's agent was informed of this, and rather than leave a car load until the next day loaded a number of the cattle into a box car unsuited to such purpose, as a result of which they were injured. *Held*, that plaintiffs were not entitled to recover for such injury, defendant being entitled to a reasonable time to furnish a suitable car, and the use of the unsuitable car being the act of plaintiffs.—*Huston v. Wabash R. Co.*, 63 Mo. App. 671.

**App. 1899.** A carrier of live stock, maintaining stock pens at its stations and advising its patrons to use them preparatory to loading, is responsible for damages resulting from the insecurity of the pens.—*Tracy v. Chicago & A. R. Co.*, 80 Mo. App. 389.

**App. 1906.** Where, at the time plaintiff offered an animal to a carrier for transportation, conditions were such, owing to the delay of a train, that the animal, if shipped,

would be detained a whole day at a certain point, of which plaintiff was informed, conceding that the cause of the delay which the shipment would have encountered was unavoidable, the carrier was liable for refusing to transport the animal unless it should be accompanied by a caretaker, or the shipper should sign a release for all damages and liabilities. Under the circumstances it was the duty of the carrier to receive the shipment, and to exercise reasonable care to supply the animal's wants in case it required food and water during detention.—*Knight v. Quincy, O. & K. C. R. Co.*, 96 S.W. 716, 120 Mo. App. 311.

**App. 1910.** The common-law duty of a carrier compelled it to furnish cars for the transportation of live stock on reasonable demand of the shipper.—*Baker v. St. Louis & S. F. R. Co.*, 129 S.W. 436, 145 Mo. App. 189.

A shipper may sue a carrier for failure to furnish cars, as for a breach of common-law duty without any contract to furnish them.—*Id.*

**App. 1914.** Where a carrier failed to furnish cars for a shipment of cattle, although its agent had stated the cars would be ready, an action for injuries to the cattle by the delay is based, not upon any verbal contract, but upon the carrier's common-law duty.—*Rittman v. Missouri Pac. Ry. Co.*, 171 S.W. 8, 184 Mo. App. 424.

That defendant's servants abandoned a train in Central Missouri because of the cold, and for that reason cars for the transportation of plaintiff's fat cattle were not furnished, shows negligence.—*Id.*

**App. 1924.** Plaintiff's act in purchasing cattle, ordering cars, and telling carrier's agent that he was ready to ship, and asking that he be notified on arrival of cars, stating that he would load and be ready to ship in two or three hours thereafter, constituted a constructive delivery of cattle for shipment, notwithstanding placing of cattle on pasture, since it was a temporary arrangement to end on arrival of cars for shipment.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

Shopmen's strike did not excuse carrier's failure to furnish cars for shipment of stock within a reasonable time, where, when order of plaintiff was filed, agent said he probably could get cars soon, and it was not claimed that a strike was in progress when order for cars was placed, and there was no evidence that plaintiff was advised that carrier was

without proper labor to keep its equipment in proper repair for service.—Id.

**App. 1925.** No cause of action can arise for railroad's breach of contract to furnish cars for shipment in interstate commerce.—*Williams v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 935, 217 Mo. App. 662.

**App. 1929.** Railroad cannot be liable for failure to notify shipper that cars were available, since it would be special service and unlawful.—*Tuttle v. Quincy, O. & K. C. R. Co.*, 13 S.W.(2d) 1111.

#### 207. Special contract for transportation.

Evidence, see post, 228.

##### 207 (1). In general.

**Sup. 1876.** A station agent is presumed to possess authority to make contracts for the shipment of live stock, and any limitations on his authority in that respect must be brought to the notice of the shipper.—*Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

**Sup. 1881.** A verbal contract to furnish cars for the shipment of stock, being within the scope of the apparent authority of a railroad ticket agent, is binding on the railroad company unless the other party had actual knowledge that the contract was outside the scope of the agent's authority.—*Harrison v. Missouri Pac. Ry. Co.*, 74 Mo. 364, 41 Am. Rep. 318.

**App. 1885.** The existence of a mob preventing a railroad from carrying out a special contract of shipment of cattle containing no condition against mobs does not relieve it from the burden of its contract.—*White v. Missouri Pac. Ry. Co.*, 19 Mo. App. 400.

A contract of shipment providing that the railroad would transport the cattle "to the National Stockyards station at the rate of \$35 per car, with privilege of Chicago at \$45 per car," etc., gave the shipper the right to ship to St. Louis with the privilege of determining within a reasonable time whether he would ship on to Chicago.—Id.

Where a contract of shipment of cattle gave the shipper the privilege of reshipping to a different destination than the point named as the original destination, but specified no time for the exercise of the privilege, the law would imply a reasonable time.—Id.

The fact that a shipper of cattle knew that a railroad had no line extending from St. Louis to Chicago was no reason for the rail-

road and shipper not contracting for a transportation through to Chicago.—Id.

**App. 1886.** A station agent, empowered to receive and forward freight, has apparent authority to agree to have a certain number of cars ready at a certain time to receive a shipment of cattle.—*Gelvin v. Kansas City, St. J. & C. B. Ry. Co.*, 21 Mo. App. 273.

**App. 1895.** Where a railroad company entered into an express contract to furnish cars and receive and ship cattle on a certain day, instructions based on the theory that an act of God would excuse performance were properly refused.—*Miller v. Chicago & A. Ry. Co.*, 62 Mo. App. 252.

**App. 1902.** A case was tried on the theory that a railroad company had agreed with a shipper to have cars ready at a certain hour to receive his cattle to be shipped so as to reach a certain day's market. The cars were not ready at the hour specified, but were at a later hour, which would still have brought them to the market in time. *Held*, that the element of time was essential only as to the time of arrival, and therefore the shipper could not refuse to ship at the later hour, and recover from the carrier for a breach of the contract.—*Currell v. Hannibal & St. J. R. Co.*, 71 S.W. 113, 97 Mo. App. 93.

**App. 1906.** By a written contract between a shipper and carrier, the carrier agreed to forward cattle from a certain place, but at the head of the paper preceding the agreement, it appeared that the shipper offered the cattle for shipment to a certain place, and the back of the contract was indorsed showing the point of shipment and destination. *Held*, that the contract called for the destination specified in the head and in the indorsement.—*Lee v. Wabash R. Co.*, 94 S.W. 991, 118 Mo. App. 476.

**App. 1908.** A clause in a bill of lading reciting that agents of the carrier were "not authorized to agree to forward live stock to be delivered at a specified time, nor for any particular market," is not a limitation of the power of a station agent to agree to furnish cars and receive freight for shipment on a particular date, but is merely notice to the shipper that the agent had no power to bind the carrier absolutely to deliver a car load of stock on a particular date.—*Mertwether v. Quincy, O. & K. C. R. Co.*, 107 S.W. 434, 128 Mo. App. 647.

A bill of lading reciting that the agents of a carrier were not authorized to agree to

forward live stock to be delivered at a specified time, nor for any particular market, taken in connection with the further clause that the carrier did not agree to so deliver live stock, was meant to save the carrier from liability for unavoidable delay, but did not excuse the company from carrying the freight in a reasonable time, nor for delays avoidable by care and diligence.—Id.

**App. 1916.** A shipper of live stock is precluded from contending that his shipment was not made under the bill of lading, in view of his signature thereto and the Carmack Amendment requiring a written contract of shipment.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282.

**App. 1920.** Under 45 USCA § 71, providing that on written request of the owner of live stock shipped in interstate commerce the time of its confinement on cars may be extended from 28 to 36 hours, where a shipper, to escape contagion at a point en route, desired more time for transit without unloading than 28 hours, by giving his written request for extension of time to 36 hours, he became entitled to such an extension as would cause unloading not earlier than some time between 28 and 36 hours.—*Bradford v. McAdoo*, 219 S.W. 92, 202 Mo. App. 412.

**App. 1921.** If there was a custom that the expression "36-hour release attached" meant that the carrier of live stock agreed not to unload the shipment within a certain time, then the contract between the shipper and the carrier, executed in view of the custom, constituted an agreement on the carrier's part to such effect as much as if it had been explicitly written into the contract.—*Bradford v. Hines*, 227 S.W. 889, 206 Mo. App. 582.

A carrier of live stock which attached to the shipping contract a so-called 36-hour release to extend its limit for confining the stock under 28-Hour Law, § 1 (45 USCA § 71), to 36 hours did not obligate itself not to unload the shipment until after the lapse of 28 hours.—Id.

**App. 1921.** All live stock contracts must be construed liberally in favor of the shipper against the carrier.—*Thee v. Wabash Ry. Co.*, 233 S.W. 959, 208 Mo. App. 200.

**App. 1922.** A shipper did not waive right to damages for delay in furnishing a stock car after notice by a provision of a subsequent contract providing that all prior contracts, and understandings, as to the receipt

or transportation of stock or the furnishing of cars therefor are waived by the shipper and merged in the agreement; the right to damages for the delay being based on the carrier's violation of its common-law duty, and not on breach of contract.—*Hines v. Hines*, 236 S.W. 886.

A stock shipping contract prepared by a carrier will not be enlarged beyond its strict terms.—Id.

## 207 (2). Validity of contract.

**Sup. 1900.** Where stock was shipped at less than the legal rate, under a contract exempting the carrier from certain statutory liabilities, but the carrier refused to ship the stock without such contract, unless a charge larger than the legal rate was paid, the act of the company was not illegal, and the shipper was bound by the contract.—*Paddock v. Missouri Pac. Ry. Co.*, 56 S.W. 453, 155 Mo. 524.

**App. 1908.** A station agent appearing to be clothed with the usual powers of such agent may make a valid contract with a shipper to furnish stock cars at a stated time, in the absence of knowledge of the shipper of any limitations on the agent's authority, and in view of the fact that the course of dealing between the same parties recognized such contracts as valid.—*Meriwether v. Quincy, O. & K. C. R. Co.*, 107 S.W. 434, 128 Mo. App. 647.

**App. 1916.** Under Interstate Commerce Act, § 1, as amended by 34 Stat. 584, providing that shipper may accompany live stock if it is accepted for shipment, fact that a carrier's conductor told plaintiff's agent, who was accompanying a shipment, that he could not do so unless he signed a contract did not furnish consideration for the contract.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1920.** In an action against a railroad company for breach of contract, the pleaded oral contract for shipment of live stock was illegal under the Carmack Amendment to the Interstate Commerce Act (49 USCA § 20), requiring written receipt or bill of lading.—*Thee v. Wabash Ry. Co.*, 217 S.W. 506.

**App. 1920.** Where the shipper of live stock in interstate commerce, under 45 USCA § 71, requested extension of time of confinement from 28 to 36 hours, and the carrier agreed, a lawful contract resulted which gave rise to a cause of action in the shipper if vio-

lated by the carrier.—*Bradford v. McAdoo*, 219 S.W. 92, 202 Mo. App. 412.

**App. 1920.** No verbal agreement for cattle cars for shipment in interstate commerce can be relied on under the Carmack Amendment (49 USCA § 20), which requires a written contract, nor can a preliminary oral agreement for a future interstate shipment.—*Underwood v. Hines*, 222 S.W. 1037.

**App. 1921.** Under the federal law a contract covering an interstate shipment of live stock must be in writing.—*Bradford v. Hines*, 227 S.W. 889, 206 Mo. App. 582.

207 (3). **Modification or merger.**

**App. 1876.** In an action against a carrier by a shipper of cattle for negligence whereby they were injured, plaintiff was not required to sue on his written contract with the carrier, such written contract being a mere modification in some respects of the obligations of the defendant imposed on it by law.—*Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

**App. 1903.** A shipper contracted with a carrier orally for a car for his cattle on a certain day. The parties then reduced the contract to writing, in which it was provided that the shipment was not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market, and also that the shipper released any cause of action for damages which might accrue to him by any previous contract. *Held*, that the written contract superseded the oral one.—*Helm v. Missouri Pac. R. Co.*, 72 S.W. 148, 98 Mo. App. 419.

**App. 1908.** Where a verbal agreement is made between a shipper and a carrier to furnish stock cars at a certain time and to deliver the stock immediately, and a bill of lading is executed while the oral contract is unbreached and still executory, reciting that the carrier does not agree to deliver the stock at destination at any specified time, the verbal agreement is merged in the bill of lading.—*Meriwether v. Quincy, O. & K. C. R. Co.*, 107 S.W. 434, 128 Mo. App. 647.

**App. 1912.** A carrier was liable at common law for its failure to promptly deliver mules to a destination orally agreed upon, though the parties, as a mere matter of form without intending it to have any effect, entered into a written contract, naming another and fictitious destination.—*Deierling v. Wabash R. Co.*, 146 S.W. 814, 163 Mo. App. 292.

208. **Duties in respect to transportation.**

**App. 1915.** Carrier of live stock must exercise ordinary care to maintain its stock pens in reasonably safe condition.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233. See Carriers, 215(2) in this Digest.

**App. 1916.** Railroad companies are liable for damages caused by failure to furnish a reasonably fit and suitable place in which to put stock received for shipment.—*McSpadden v. Lusk*, 186 S.W. 731.

209. **Mode or means of transportation.**

**App. 1911.** A carrier was liable for injuries to a mule, caused by her getting her leg through a hole left by the breaking of a defective slat in the car in which she was transported.—*Green v. Chicago, M. & St. P. Ry. Co.*, 137 S.W. 611, 156 Mo. App. 259.

**App. 1912.** A shipper who loaded a car instead of waiting for a better car next day, as promised by carrier, *held* not entitled to hold carrier liable for defects in the car.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 1199, 164 Mo. App. 444, adopting opinion (1911) 134 S.W. 665, 154 Mo. App. 420.

**App. 1918.** Where carrier of live stock undertook to erect a partition in a car so as to separate the animals, it must, regardless of the primary duty of erecting the partition, construct a reasonably safe one.—*Crow v. Bush*, 200 S.W. 762.

**App. 1923.** Live stock carrier was not required to keep door of car in such condition that the animals could not break through it regardless of their vicious qualities.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

**App. 1925.** Shipper's knowledge of shopmen's strike would be no notice as to carrier's inability to furnish cars, in absence of notice.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

210. **Loading and unloading.**

Limitation of liability, see post, 218(S).

**Sup. 1881.** A provision in a contract for the shipment of cattle that the shipper should be entitled to free passage for two men to take care of the cattle, which should be taken care of, loaded, and unloaded at the shipper's risk, does not entitle the shipper to determine when the cattle shall be loaded or unloaded, but merely obligates him to perform the labor at such time or times as may be selected by

the railroad company.—*McAlister v. Chicago, R. I. & P. R. Co.*, 74 Mo. 351.

**App. 1895.** In an action for injury to hogs shipped over defendant's railroad where the weight of the load was several thousand pounds less than was allowable for such sized car, a finding that the car was not overloaded was authorized.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

**App. 1908.** It is the duty of a carrier of live stock to furnish a safe place for their unloading.—*Letts v. Wabash R. Co.*, 111 S.W. 138, 131 Mo. App. 270.

**App. 1909.** A carrier's common-law duty includes the unloading of a horse transported by it.—*Creel v. Missouri Pac. Ry. Co.*, 119 S.W. 30, 137 Mo. App. 27.

A carrier's duty to safely unload, for delivery to a consignee, a horse transported by it, is not shifted by the consignee's servant, sent after the horse, participating in the unloading.—*Id.*

The carrier's common-law liability with respect to the shipment is that an insurer, so that its liability for injury in unloading does not depend on negligence.—*Id.*

**App. 1911.** A carrier of live stock, required by contract or by common law to exercise proper care for the preservation of live stock in transportation, need not permit the shipper to unload the stock for two weeks, to improve the stock and make it more suitable for market; and the right of a shipper to such a privilege must be expressed in his contract of shipment.—*Banks v. Chicago, B. & Q. R. Co.*, 134 S.W. 1071, 153 Mo. App. 469.

**App. 1919.** Where shipment contract required shipper to unload the cattle, it will be assumed that it was carrier's duty to place the car at the unloading chutes, and that it was then the duty of the stockyards company to unload them, acting as agent for shipper.—*McMickle v. Wabash R. Co.*, 209 S.W. 611.

#### 211. — Food, water, and rest.

Pleading in action for injuries, see post, 227(3).

**App. 1894.** Where plaintiff shipped horses under a special bill of lading requiring him to feed, water, and unload them, and defendant refused plaintiff an opportunity to feed and water them at a place of delay where opportunity might have been allowed, and injuries resulted, the defendant is liable.—*Duve-*

*nick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550.

Where a shipper of live stock agrees with the carrier, by special contract, to load, unload, feed, and water his stock, the carrier owes the shipper no duty in such regard, if it afford him an opportunity to so unload, feed, and water such stock.—*Id.*

**App. 1895.** Plaintiff shipped horses over defendant's railroad under a bill of lading providing that the shippers were to feed and water the stock at their own risk and expense. At the time of making the contract there was an oral understanding between the parties that the plaintiff should be permitted to feed and water the stock at Kansas City, which was the usual place for so doing. Plaintiff was prepared to feed and water the stock at Kansas City, but defendants failed to give plaintiff an opportunity so to do, but delivered the stock to a connecting carrier, whereby the stock were not watered or fed for nearly two days and a half, considerably damaging the stock. *Held*, that the provision in the bill of lading making it the duty of plaintiff to feed and water the stock did not relieve defendant from its duty to afford plaintiff an opportunity to do so.—*Lowenstein v. Wabash R. Co.*, 63 Mo. App. 68.

Evidence of the parol agreement that plaintiff should have an opportunity to feed and water the stock at Kansas City, and the custom of feeding and watering at such place, was properly admitted, the bill of lading being silent as to where the stock should be fed and watered.—*Id.*

**App. 1907.** Where 93 fat beef cattle were loaded in five cars, it sufficiently appeared that the cattle were not afforded space and opportunity to rest so as to relieve the carrier from the obligation of unloading at the end of 28 consecutive hours, as provided by Rev. St. U. S. §§ 4386, 4387, 4388.—*Ecton v. Chicago, B. & Q. Ry. Co.*, 102 S.W. 575, 125 Mo. App. 223.

**App. 1908.** Where during a delay in the transportation of plaintiff's horses at a junction, the carrier's agent accepted compensation from plaintiff to pay for necessary food and water for them, the carrier was responsible for its failure to perform such service, whether the delay was negligent or unavoidable, and notwithstanding the transportation contract provided that plaintiff assumed the risk and expense of feeding, watering, etc.—*Gilbert v. Chicago, R. I. & P. Ry. Co.*, 112 S.W. 1002, 132 Mo. App. 697.

**App. 1914.** A carrier of live stock, such as hogs, is bound to use every precaution to keep them from becoming overheated, and for that purpose should not only throw water over them, but should give them water to drink.—*Bilby v. Chicago, B. & Q. R. Co.*, 171 S.W. 39, 184 Mo. App. 644.

A carrier which negligently failed to provide for the watering of stock in the pens at its station is liable, where hogs died because they could not be watered at the pens where they were delivered by the carrier.—*Id.*

**App. 1915.** A shipper of live stock is charged with knowledge of the law relating to the feeding and watering of such stock.—*Cox v. St. Louis & S. F. R. Co.*, 174 S.W. 127, 188 Mo. App. 515.

**App. 1915.** Where it appeared that the five-hour rest required under the federal 28-Hour Law had been allowed, and that the law had not been violated, *held* that the defendant carrier's liability depended on the terms of the shipment contract and duties arising therefrom by operation of law.—*Kent v. Chicago, B. & Q. R. Co.*, 176 S.W. 1105, 189 Mo. App. 424.

**App. 1921.** The power granted the shipper of live stock under 28-Hour Law, § 1 (45 USCA § 71), to extend to 36 hours the time within which the carrier can confine the cattle, is not a privilege to ipso facto impose an obligation on the carrier to keep the stock confined as long as 28 hours, but only a privilege to extend the time of confinement from 28 to 36 hours.—*Bradford v. Illinois*, 227 S.W. 889, 206 Mo. App. 582.

It was the common-law duty of a carrier transporting live stock for long distances to feed, water, and rest them at suitable intervals to avoid injury.—*Id.*

**App. 1923.** A failure by a carrier to comply with 45 USCA §§ 71-74, requiring a carrier to unload, feed, water, and rest stock in transit, is negligence per se, rendering the carrier liable for resulting injuries to the stock.—*Johnson v. Wabash Ry. Co.*, 251 S.W. 719.

Under 45 USCA §§ 71-74, requiring carrier to unload, feed, water, and rest stock in transit, it is the duty of the carrier, not only to unload the animals within the stated period, but also to provide reasonably suitable conveniences for feeding, watering, and caring for the animals and a place reasonably suitable and sufficient to allow the animals to obtain rest.—*Id.*

## 212. Duties in respect to delivery.

**App. 1895.** Where a petition in an action for failure to ship cattle on a certain day alleged a verbal contract by defendant to furnish cars and receive and ship the cattle on a certain day, an answer setting up that on the following day plaintiff delivered the cattle to it under a certain written contract of shipment in which it was agreed that a certain time should be a reasonable time in which to transport the cattle, and plaintiff agreed not to make any claim for damages if the shipment was made in such time, and further it was mutually agreed that notice of loss or damage should be given in five days, was properly struck out, the contract being made after the alleged breach of the verbal contract, and there being no provision alleged that released defendant from its liability arising from the breach of the verbal contract, or that plaintiff waived any right already accrued, or that the written contract merged the defendant's liability for the breach of the verbal contract, or that a performance of the conditions of written contract excused a nonperformance of the verbal contract.—*Miller v. Chicago & A. Ry. Co.*, 62 Mo. App. 252.

**App. 1901.** Where the evidence showed that the place of business of the consignee was the stockyards at Kansas City, and the carrier received pay for shipment to the consignee at their place of business, the Kansas City stockyards, and not Knoche station, which was defendant's Kansas City station, was the destination of the consignment under the contract of shipment.—*Jones v. St. Louis & S. F. R. Co.*, 89 Mo. App. 653.

**App. 1908.** Where cattle were shipped to the Union Stockyards in Chicago, a delivery at the unloading platforms in the yards constituted a full performance of the carrier's contract as to delivery, and relieved it from responsibility for damages subsequently accruing.—*Ratliff v. Quincy, O. & K. C. R. Co.*, 110 S.W. 606, 131 Mo. App. 118.

**App. 1910.** Cattle shipped were delivered to the consignee when they were receipted for and taken charge of by its agent, so that the carrier would not thereafter be responsible for them.—*Edwards v. Lee*, 126 S.W. 194, 147 Mo. App. 38.

**App. 1914.** Where a shipment of hogs was unloaded and placed in the custody and under the control of the consignee, there was a delivery.—*Bilby v. Chicago, B. & Q. R. Co.*, 171 S.W. 39, 184 Mo. App. 644.



**App. 1915.** There was a conversion of shipment of horses by carriers where they changed the consignment from one to the order of "M. [the shipper], notify C.," to a straight consignment to C.—*People's State Savings Bank v. Missouri, K. & T. Ry. Co.*, 178 S.W. 292, 192 Mo. App. 614.

A shipper, having taken possession of the horses shipped with such knowledge and intention that a waiver of the carriers' conversion by change of the consignment results, cannot recall the waiver.—*Id.*

**App. 1917.** Carrier *held* justified in diverting shipment as ordered by consignor and in ignoring a subsequent notice from the consignees, where it had no notice that the consignees were the consignor's agents and not liable for delay thereby caused.—*Wichita Poultry Co. v. Southern Pac. Ry. Co.*, 198 S.W. 82, 197 Mo. App. 578.

**App. 1921.** Where a carrier had knowledge that the shipper was the owner of breeding ewes consigned to an agent at the independent stockyards at St. Louis, the fact that the carrier wrongfully delivered them to the same agent at other yards, where they were sold for immediate slaughter, will not exonerate the carrier, which was advised if sent to the yards where delivered they would be sold for slaughter, for the consignee is to be regarded as an agent of the owner to receive only at the proper destination.—*McNeill v. Wabash Ry. Co.*, 231 S.W. 649, 207 Mo. App. 161.

**App. 1922.** A carrier, having received live stock for shipment, and been advised of consignee's name, is then under duty of transporting and delivering it to the designated consignee.—*Montgomery v. Davis*, 240 S.W. 282, 209 Mo. App. 698.

Where shipper's caretaker did not learn of the wrongful delivery of the cattle until after they had been sold, and some of them delivered, *held*, there was no waiver of the shipper's rights relative thereto, and that there was nothing in the contract of the caretaker even if he had been clothed with authority therefor that could be construed as a waiver of the carrier's liability, since a waiver is an intentional abandonment of a known right, and that there can be no waiver unless intended by one party, and so understood by another.—*Id.*

Where a carrier delivered cattle to the wrong consignee, and they are sold, and the shipper receives anything in payment there-

for, the amount so received is to be held in mitigation of damages against the carrier, and shipper's accepting it does not ratify or waive wrong delivery.—*Id.*

**App. 1926.** "Actual delivery" by carrier of live stock shipped to commission company is necessary to complete contract of carriage.—*Carr v. St. Louis-San Francisco Ry. Co.*, 284 S.W. 184.

### 213. Delay in transportation or delivery.

Damages, see post, 229(1).

Defenses in action for delay, see post, 223.

Evidence, see post, 228(5).

Instructions, see post, 230.

Liability of connecting carriers, see post, 219.

Questions for jury, see post, 230.

**Sup. 1867.** In an action for delay in transporting plaintiff's stock, it was claimed that, after the stock was registered for shipment, stock of others arriving at a neighboring station was forwarded before that of plaintiff. *Held*, that the carrier was not liable, since the rule that it is the duty of a carrier to haul stock in the order of its tender for shipment only applies to the station at which the stock is offered.—*Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

**Sup. 1872.** In an action against a railroad company for damages resulting from delay in forwarding stock, the fact that such delay was caused by the lack, on the part of the company, of proper appliances for transportation, is no defense.—*Tucker v. Pacific R. Co.*, 50 Mo. 385.

**App. 1880.** Defendant owns and operates a railroad from East St. Louis to Indianapolis, connecting there with the Panhandle road, which connects at Pittsburg with the Pennsylvania Central. On July 20, 1877, plaintiff delivered to defendant certain cattle to be transported to Philadelphia, at which time there was no obstruction of defendant's line. From July 21st to August 1st strikers and rioters held possession of all roads by which Philadelphia could be reached. Defendant promptly transported the cattle to the terminus of its line in Indianapolis, and turned them over to the Panhandle road at its stockyards with all convenient dispatch, where they were kept until the roads were open for traffic, when they were at once sent forward. *Held*, that defendant was not guilty of any breach of its duty to plaintiff in ac-

cepting the goods for transportation on July 20th, and instructions putting the case to the jury on the theory that defendant proceeded with the goods in the face of impending danger were not warranted by the evidence in the case.—*McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

**App. 1886.** Where a railroad company did not inform a shipper at the time stock was delivered for shipment that a bridge was out on its line so that the stock would have to be sent to its destination by another route, the fact that the bridge was out was no excuse for the delay.—*Guinn v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 453.

**App. 1893.** Where in an action against a carrier for delay in carrying cattle it appeared that they should have arrived about 24 hours after their shipment, but that they were in transit 42 hours, and were once side tracked for about 6 hours, there was sufficient evidence of delay.—*Douglass v. Hannibal & St. J. R. Co.*, 53 Mo. App. 473.

**App. 1893.** Defendant railroad company contracted to ship plaintiff's stock to market by a special stock train, the contract providing that the parties agreed that schedule time and 12 hours additional should be considered a reasonable time for the transportation of the stock. *Held* that, notwithstanding this contract, the railroad company was liable to transport the cattle with all reasonable dispatch, and that, though any failure short of negligence of the defendant would be covered by the provision as to what should constitute a reasonable time, the railroad company was liable for a negligent delay.—*Leonard v. Chicago & A. Ry. Co.*, 54 Mo. App. 293.

**App. 1895.** A contract for the shipment of cattle provided that from the time the train actually starts the schedule time of freight trains with 12 hours added thereto, and not including time lost for stops for feed, water, rest or proper care of the animals, is a reasonable time for the transportation of the stock, and if the stock shall be transported within that time the shipper agrees not to claim any damages for delay in transit. *Held*, that such contract is not one for transportation at a fixed time or within a fixed time, but that if the stock should be transported within the time specified no damages could be claimed, to which the law adds the further stipulation, viz., provided such delay does not arise from the carrier's negligence.—*Blanchard v. Chicago & A. Ry. Co.*, 60 Mo. App. 267.

**App. 1900.** When a common carrier undertakes to transport live stock, it is required to use diligence to transport them within a reasonable time.—*Glasscock v. Chicago, R. I. & P. Ry. Co.*, 86 Mo. App. 114.

**App. 1903.** The refusal of a shipper of live stock to comply with the provisions of the contract of shipment requiring that some one accompany the stock to care for them, and that they shall be loaded and unloaded, watered, and fed by the shipper's agent, will not excuse the carrier from transporting the stock to their destination without unreasonable delay, caring for them at the shipper's expense.—*Spalding v. Chicago B. & Q. R. Co.*, 73 S.W. 274, 101 Mo. App. 225.

**App. 1903.** Where hogs were delivered to a railroad company, as directed by its agent, just prior to the schedule time for the arrival of the train upon which they were shipped, the duty of moving them without unreasonable delay was imposed upon defendant.—*McCrory v. Missouri, K. & T. Ry. Co.*, 74 S.W. 2, 99 Mo. App. 518.

**App. 1906.** Where, in an action against a carrier for delay in transporting cattle consigned to commission merchants, it appeared that it was the custom to deliver cars at the unloading platforms of a stockyards company, which notified the consignee, and that delivery at the platforms was regarded as a delivery to the consignee, it was error to refuse an instruction that defendant's full duty was performed when it carried the stock to the proper unloading platform, and that it was not responsible for any delays in unloading by the stockyards company, or for damages by reason of lapse of time between the arrival of the train at the yards and arrival at the selling pens of the consignee.—*Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644.

A common carrier is required to exercise reasonable diligence to complete the transportation of cattle without delays that could have been avoided by reasonable care.—*Id.*

Reasonable care imposes on a carrier the duty to provide a sufficient number of trains for the proper transaction of its ordinary business, and it is negligence for it to overload a train and thereby cause unreasonable delay in transporting cattle.—*Id.*

**App. 1907.** Where a reasonable time for the transportation of an interstate shipment of cattle exceeded 28 hours, which was the longest time the carrier was authorized to

keep the cattle in the cars without unloading for rest, food, and water, as provided by Rev. St. U. S. § 4386, and if time had not been lost by delays the transportation period would not have been less than 28 hours, delay caused by the carrier's unloading cattle in transit for rest, food, and water under such act was not negligence.—*Ecton v. Chicago, B. & Q. Ry. Co.*, 102 S.W. 575, 125 Mo. App. 223.

Where a freight train, by which plaintiff's cattle were transported, before arriving at the point where the cattle were taken up, killed a man who suddenly appeared on the track, and the train was delayed by the efforts of the crew in taking the body from the track and carrying it back to a station, such delay was not negligence, but the result of accident or misfortune.—*Id.*

The time customarily made by a carrier for shippers of cattle between certain points will be considered a reasonable time so far as such shippers are concerned.—*Id.*

Where there is no contract to deliver within a given time, it is the carrier's duty to transport live stock within a reasonable time.—*Id.*

**App. 1908.** Where there was an unusual delay of more than 24 hours in the transportation of plaintiff's horses, and at least half of the delay was apparently inexcusable, and occurred while defendant's agent knew that plaintiff was keeping a sharp lookout for the arrival of the horses, in order to give them needed attention, the carrier was negligent.—*Gilbert v. Chicago, R. I. & P. Ry. Co.*, 112 S.W. 1002, 132 Mo. App. 697.

**App. 1908.** A carrier was not liable for injuries to cattle by delay in transportation caused by a snowstorm obstructing the tracks.—*Vencill v. Quincy, O. & K. C. R. Co.*, 112 S.W. 1030, 132 Mo. App. 722.

Where the injury to an engine which caused a delay in the transportation of plaintiff's cattle was due either to negligence of defendant's employes in making couplings or to a defective engine end sill, and there was no evidence that the engine had been properly inspected before it left defendant's division point, defendant was responsible for such delay, under the rule that only such causes as cannot be reasonably anticipated, controlled, or avoided by reasonable care will excuse a carrier's unusual delay.—*Id.*

**App. 1909.** A shipper suffering loss by the decline in the market and shrinkage of his

cattle, occasioned by the carrier's negligent delay in transit, can recover the loss sustained.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276.

**App. 1909.** A carrier must safely carry the stock and deliver it at destination within a reasonable time, unless prevented by act of God, the public enemy, or by unavoidable accident.—*Thompson v. Quincy, O. & K. C. R. Co.*, 117 S.W. 1193, 136 Mo. App. 404.

**App. 1910.** Where a carrier, with knowledge of a shortage in its coal supply, contracted to transport cattle without stipulating against delays therefrom or notifying the shipper that such delays might be encountered, the carrier assumed the risk of delays arising from such cause, and it could not escape liability for such delays.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

Where a carrier burdened with a sudden and extraordinary press of business contracted to transport cattle without stipulating against delays on account of such business or notifying the shipper that such delays might be encountered, the carrier was liable for delays caused thereby.—*Id.*

**App. 1910.** Where a portion of a shipment of horses was loaded at an intermediate point, in an action for delay in transportation, based on a breach of the carrier's common-law duty, where the defense was a delay caused by floods, the fact that the carrier had no knowledge that floods would delay the shipment at the time the shipment commenced did not relieve the carrier from liability as to the horses loaded at the intermediate point.—*Thero v. Missouri Pac. Ry. Co.*, 129 S.W. 266, 144 Mo. App. 161.

**App. 1910.** Where a carrier is guilty of negligent delay in shipping cattle, though the negligent act must be the proximate cause of the injury to hold the carrier responsible, yet, if the injury follows as a direct consequence of the negligent act, it cannot be said that the carrier is not responsible because the particular injury could not have been anticipated.—*Gillespie v. Louisville & N. R. Co.*, 129 S.W. 277, 144 Mo. App. 508.

**App. 1911.** Though a carrier of live stock is not bound to transport the same for any special market or by the utmost dispatch, it is bound to carry the stock by some train in such time as would obtain arrival within a reasonable time.—*Lay v. Chicago, B. & Q. R. Co.*, 138 S.W. 884, 157 Mo. App. 467.

Stoppage of a shipment of cattle for feed and rest required by Act June 29, 1906, c. 3594, 34 Stat. 607 (45 USCA §§ 71-74), is no defense to an action for damages resulting from negligent delay in transportation where, but for such delay the cattle could have been transported to destination before the expiration of the 36 hours provided by the interstate commerce act as the limit of confinement.—*Id.*

**App. 1912.** A carrier *held* not liable for delay unless occasioned by its negligence.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 144 S. W. 1199, 164 Mo. App. 444, adopting opinion (1911) 134 S.W. 665, 154 Mo. App. 420.

**App. 1912.** The fact that a shipper tendered a check instead of money for freight charges did not relieve the carrier of liability for injuries to live stock due to delay in permitting the shipper to take the animals where it appeared that the money if tendered would have been refused.—*Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273.

**App. 1913.** A mere delay in a shipment of live stock will not support a recovery, though from the nature of the relation of carrier and shipper slight circumstances tending to show negligence are sufficient.—*Muir v. Missouri, K. & T. Ry. Co.*, 154 S.W. 877, 168 Mo. App. 542.

**App. 1913.** A carrier is not liable for a delay in the shipment of live stock caused solely by compliance with the requirements of the federal Twenty-Eight Hour Law (45 USCA §§ 71-74).—*Hickey v. Chicago, B. & Q. R. Co.*, 160 S.W. 24, 174 Mo. App. 408.

Where the scheduled time for a shipment of live stock was more than 28 hours, the failure of the shipper to file a request that they be carried for 36 hours without food, and not the negligence of the carrier in delaying the train at a certain point, *held* to be the cause of the failure of the cattle to reach their destination.—*Id.*

Where there was no regular cattle train leaving a junction point after the time required for rest and feeding the cattle, as required by Act June 29, c. 3594, 34 Stat. 607 (45 USCA §§ 71-74) the carrier is not liable for delay caused by waiting for the next regular cattle train.—*Id.*

**App. 1914.** Delay in transporting live stock to market due to necessity of repairing the railroad bed after a severe rain storm *held* unavoidable, and damages not recoverable.—

*Weesen v. Missouri Pac. Ry. Co.*, 162 S.W. 304, 175 Mo. App. 374.

**App. 1914.** While mere delay in the transportation of live stock is insufficient to support a recovery, delay under such circumstances as to raise even a slight inference of negligence is sufficient.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 341, 181 Mo. App. 142.

**App. 1914.** Where a contract for shipment of live stock did not call for any particular market, the carrier is bound only to transport it in a reasonable time.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 344, 181 Mo. App. 244.

A shipper is entitled to be notified of a change in the time of a train upon which he proposed to ship cattle, where such change, which would require them to be held over in the yards to await a later market than the one which the shipper supposed he would reach, did not appear in the published schedules.—*Id.*

A carrier cannot defeat recovery for delay of a shipment of cattle on the ground that the packers ceased buying at a certain hour, where the delay deprived the shipper of the benefit of the afternoon market, at which cattle bring a better price than if held over in the yards for a night, and then sold as stale cattle.—*Id.*

**App. 1920.** Before carrier can be held liable for delay of interstate shipment, shipper must show negligence or some other fault on carrier's part.—*Miller v. Quincy, O. & K. C. R. Co.*, 225 S.W. 116, 205 Mo. App. 463.

**App. 1921.** A carrier is not responsible for delay in delivering a shipment of cattle in the absence of negligence.—*Bland v. Chicago & A. R. Co.*, 232 S.W. 232.

**App. 1921.** Where, when "stock pick-up extra" train reached a point 47 miles from the stockyards and market at 3 o'clock a. m., the conductor knew that there would be delays preventing the train from reaching the stockyards in time for the market at 8 o'clock a. m., it was negligence for the carrier to fail to notify shipper, loading his cattle at that point, of that fact.—*Holland v. Hines*, 234 S. W. 366.

**App. 1921.** A carrier of hogs was not chargeable with delay in unloading hogs due to congestion at the stockyards to which they were shipped, a cause wholly beyond its control.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1922.** Where a carrier negligently delays a shipment of live stock, so that the shipment reaches destination after the day's sales are over, necessitating the shipper subsequently to sell on a declining market, the shipper has a cause of action.—*Neely v. Hines*, 237 S.W. 906.

A carrier accepting a shipment of live stock is chargeable with notice that such freight is highly perishable, and that any delay in transporting it may cause damage.—*Id.*

**App. 1923.** In cases where delay is the ground of a cause of action against a live stock carrier the absence of negligence excuses the carrier.—*Crowdis v. Quincy, O. & K. C. R. Co.*, 255 S.W. 347.

**App. 1927.** Requirement in bill of lading that carrier use "reasonable despatch" merely requires delivery of poultry shipment within reasonable time.—*Parsons v. Chicago, B. & Q. R. Co.*, 300 S.W. 324.

**App. 1929.** Evidence that cattle were placed on market as soon as if there had been no delay in shipment precluded recovery for decline in market.—*Crowell v. St. Louis-San Francisco Ry. Co.*, 11 S.W.(2d) 1055.

#### 214. Loss or injury.

By connecting carrier, see post, 219.  
Instructions, see post, 230.  
Questions for jury, see post, 230.

#### 215. — Liability in general.

##### 215 (1). In general.

**Sup. 1887.** The placing of a car bedded with straw, containing valuable live stock, so near the engine that sparks therefrom could easily ignite the straw, and thus burn up and consume the car and its contents, is negligence.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**App. 1886.** In an action against a railroad company to recover damages for failure to carry live stock according to contract, it appeared that plaintiff applied to defendant's agent for a car in which to ship the stock, that the agent pointed out to him a car standing on its track and told him to load the stock into that. Plaintiff loaded the stock into that car. After the loading, the company's agent presented to plaintiff a contract of shipment in which nothing was said in the contract about the number of the car. On the margin of the contract there was a memorandum giv-

ing the number of the car. *Held*, that the designation in the margin of the number of the car was not a part of the contract of shipment so as to bind the company to deliver that particular car, so that it was not liable to the shipper if his hogs were lost by being put into another car.—*Wilson v. Wabash, St. L. & P. Ry. Co.*, 23 Mo. App. 50.

**App. 1894.** A provision in a contract for the shipment of cattle to market, to the effect that the parties agreed that the schedule time and 12 hours additional should be considered reasonable time for transporting the cattle, does not relieve the carrier from liability for the loss resulting from delay caused by its negligence, even though such delay did not exceed the 12-hour limitation of the contract.—*Leonard v. Chicago & A. R. Co.*, 57 Mo. App. 366.

**App. 1899.** In an action for injuries to live stock shipped over defendant's road there was evidence tending to prove negligence of defendant's servants where it was shown that when the cars were in motion the circulation of air tended to keep the stock in good condition, but that defendant stopped at stations for an unnecessary length of time and left the cars at points with reference to other cars where they could not have the advantage of the breeze, and this, after they knew that one of the animals was dead and two others down, and that the train was delayed by standing on the track six hours in a distance of 200 miles, and that when plaintiff complained he was assured that there would be a better run, when in fact there was no improvement made, and the stock was afterwards cut out from the train and left standing for more than two hours.—*Minter v. Chicago, R. I. & P. Ry. Co.*, 82 Mo. App. 130.

**App. 1909.** A carrier is insurer against loss or injury to stock, except such as occurs through act of God, public enemy, natural vice of animals, or act of owner.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659. See Carriers, 205 in this Digest.

**App. 1910.** A carrier was liable for damages caused by delivering to plaintiff's consignee cattle other than those shipped by plaintiff, irrespective of to whom such other cattle belonged.—*Edwards v. Lee*, 126 S.W. 194, 147 Mo. App. 38.

**App. 1911.** A shipper of live stock, who accepts car furnished instead of waiting for better car on following day as promised by carrier's agent, may not hold carrier liable

for defects in car.—*Otrich v. St. Lou's, I. M. & S. Ry. Co.*, 134 S.W. 605. See Carriers, 209 in this Digest.

**App. 1911.** A carrier was liable for injuries to a mule, caused by her getting her leg through a hole left by the breaking of a defective slat in the car in which she was transported.—*Green v. Chicago, M. & St. P. Ry. Co.*, 137 S.W. 611. See Carriers, 209 in this Digest.

**App. 1914.** In the transportation of live stock the liability of the carrier is not restricted to losses while the stock is in its possession, but it is liable for a loss occurring after delivery, if the cause of the loss began while they were in its possession.—*Bilby v. Chicago, B. & Q. R. Co.*, 171 S.W. 39, 184 Mo. App. 644.

**App. 1915.** Negligence of a carrier's agent in drawing a contract for transportation of live stock for market based on his omitting a stipulation *held* not the proximate cause of a loss to the shipper.—*Spelman v. Delano*, 172 S.W. 1163, 187 Mo. App. 119.

**App. 1915.** A carrier of live stock *held* an insurer save as against an act of God, the public enemy, carelessness of the shipper, or vicious propensities of the animals.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233. See Carriers, 205 in this Digest.

**App. 1919.** The defenses that loss was caused by the evil propensities of live freight, or by the act of the public enemy, or by the act of God, will not be allowed if the loss as to which they are pleaded might nevertheless have been avoided by reasonable care or effort by the carrier.—*Boyd v. St. Louis Express Co.*, 211 S.W. 702.

**App. 1920.** A carrier is not liable for the bad condition of live stock at the end of a journey, unless it is the result of negligence, so the carrier is not liable for injury incidental to a long trip in cold weather.—*Jordan v. Chicago, B. & Q. R. Co.*, 226 S.W. 1023, 206 Mo. App. 56.

**App. 1921.** If delay in shipment of cattle was not caused by carrier's negligence, it is not liable for damage sustained as the result of being placed in the sun in a railroad yard while in transit and waiting to be again moved, unless there was negligence in so placing them.—*Neeley v. Hines*, 227 S.W. 650, 206 Mo. App. 621.

**App. 1921.** Where the evidence showed that hogs, dying in transit, died from pneu-

monia, and there was nothing to show or raise an implication that the pneumonia was due to any culpability or default on the part of the carrier, rather than to the inherent weakness or physical infirmity of the animals, the carrier was not liable, whether the hogs had pneumonia when shipped or contracted it while in transit.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1922.** Even though extreme cold weather can be said to be an act of God for which the carrier is not liable, if the carrier's negligence mingled with that act, the carrier would still be liable for loss in value of live stock resulting from delay in transporting.—*Harrison v. Chicago & A. R. Co.*, 239 S.W. 871, 209 Mo. App. 526.

In action for damages from delay in transporting live stock to destination, if defendant's negligent delays in getting its trains to destination contributed approximately with delays which were not negligent, then the carrier is liable.—*Id.*

**App. 1922.** The common-law exception to the liability of a carrier for the death of animals during shipment, in case the loss results from the act of God or the public enemy, the vices or sickness of the animals, or the fault of the shipper, could not relieve the carrier from liability, unless it were the sole cause of the death.—*Erisman v. Wabash Ry. Co.*, 243 S.W. 237.

**App. 1924.** At common law, carrier is liable for loss occasioned by causes other than its own negligence, except losses occasioned by act of God, public enemy, or inherent vice.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

**App. 1927.** Shipper may sue carrier for damage to stock shipment relying on carrier's common-law liability as insurer (Carmack Amendment to Interstate Commerce Act [49 USCA § 20]).—*Dillen v. Wabash Ry. Co.*, 294 S.W. 439.

#### 215(2). Live stock awaiting transportation or delivery.

**Sup. 1881.** Where a connecting carrier unloaded cattle to transfer them to its own cars, and while so unloaded they were seized and sold under a statute prohibiting the unloading of certain kinds of cattle in the state, the fact that the statute was unconstitutional did not render the carrier liable.—*McAlister v. Chicago, R. I. & P. R. Co.*, 74 Mo. 351.

**App. 1903.** A carrier of live stock is required to furnish pens where the animals can

be safely kept while waiting to be loaded for transportation; and it is at least open to the jury to find that pens on ground sloping to the south, with no shade, shelter, or water thereon, and an embankment to the south, shutting off the breeze, are not safe pens for fat hogs during June.—*Lackland v. Chicago & A. Ry. Co.*, 74 S.W. 505, 101 Mo. App. 420.

**App. 1912.** A common carrier of live stock is required to maintain reasonably safe stock pens for the convenience of shippers.—*Reading v. Chicago, B. & Q. R. Co.*, 145 S.W. 1166, 165 Mo. App. 123.

**App. 1915.** A carrier of live stock must exercise ordinary care to maintain its stock pens in a reasonably safe condition.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233, 191 Mo. App. 710.

Where it was customary for shippers to deliver stock in a pen of the carrier, the carrier, knowing it, must exercise reasonable care to maintain pen in reasonably safe condition.—*Id.*

**App. 1915.** It was the duty of a carrier of live stock to keep its receiving pens in a reasonably safe condition to hold cattle offered for shipment until loading, considering the ordinary habits of cattle in such situation.—*Hardesty v. Atchison, T. & S. F. Ry. Co.*, 179 S.W. 725.

**App. 1922.** The common-law liability of a carrier for the delivery of a shipment of animals does not terminate when the cars containing the animals are placed on a side track at the point of destination, but continues until the cars are placed in a position where the animals can be unloaded.—*Erisman v. Wabash Ry. Co.*, 243 S.W. 237.

#### 216. — Inherent qualities, propensities, or defects.

**App. 1899.** Where horses are injured in transportation by reason of their own vices, and not through the negligent operation of the car wherein they are hauled, the carrier is not responsible therefor; but he is responsible where the injuries do not result from those causes, but rather from the carelessness or unskillful handling of the car or the train.—*Cash v. Wabash R. Co.*, 81 Mo. App. 109.

**App. 1909.** The obligation of a common carrier is not that of an insurer against injuries to animals caused by their natural and vicious propensities, and a shipper in transporting several animals takes the risk of injuries inflicted upon one animal by the vi-

cious propensities of the others.—*Foust v. Lee*, 119 S.W. 505, 138 Mo. App. 722.

**App. 1911.** While a common carrier is an insurer of inanimate goods against loss and damage, except such as is inevitable or caused by public enemies, it is not liable, as an insurer of animals, against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care, being relieved from responsibility in the transportation of animals for such injuries as occur from or in consequence of their vitality.—*Green v. Chicago, M. & St. P. Ry. Co.*, 137 S.W. 611, 156 Mo. App. 259.

**App. 1912.** While as to inanimate freight a carrier is an insurer against all perils excepting only the act of God, the public enemy, and the negligence of the shipper, as to live stock there is to be also excepted the proper vice of the animal.—*Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273.

**App. 1913.** Common carrier of live stock *held* an insurer except as to loss or injury caused by the natural vice, propensities, or infirmities of the animals, and only bound to exercise care to prevent loss from the natural inability of hogs shipped to withstand the hardships of transportation under the weather conditions.—*Winslow v. Chicago & A. R. Co.*, 157 S.W. 96, 170 Mo. App. 617.

**App. 1915.** Railroad carrying shipment of mules, in failing to sand the floor of the car so that the animals fell, thus inciting their vicious propensities, causing damage, *held* liable therefor.—*Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.*, 180 S.W. 412.

**App. 1918.** Carrier is not liable for injuries to animals being transported where such injuries result from propensities of animals themselves, or from attacks of the other animals.—*Robinson v. Bush*, 200 S.W. 757, 199 Mo. App. 184.

**App. 1919.** Although inherent vices of animals will excuse their loss by the carrier, yet it is the duty of a carrier to save them from their own inherent qualities if he can do so by the exercise of ordinary care.—*Boyd v. St. Louis Express Co.*, 211 S.W. 702.

**App. 1921.** Under the common law a carrier is not liable for damage to live stock transported, due to its inherent nature or infirmity, and not to any fault on the part of the carrier.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1922.** Vicious propensities of hog, which died during transportation, or inherent vices, did not relieve common carrier of its common-law liability for failure to deliver hog in a safe and sound condition, unless such vicious propensities or inherent vices were the sole cause of its death.—*Sullivan v. American Ry. Express Co.*, 245 S.W. 375, 211 Mo. App. 123.

**App. 1923.** Live stock carrier is not liable for injuries caused by the inherent vicious propensities of the animals, unless the negligence of the carrier and the vicious propensities of the animals concurred in causing the injury.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

Live stock carrier could have anticipated that propensity of animals to become restless, kick, and trample upon an animal that was prostrate might contribute to injure a horse if it became fastened in a defective door.—*Id.*

**App. 1924.** If carrier's negligence mingled with inherent infirmity of animals approximately co-operated to cause injury, carrier is liable.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

#### ☞217. — Contributory negligence of owner.

##### ☞217 (1). In general.

**App. 1885.** Where the shipper of cattle protested that the cars furnished him were defective, but, on being informed by the agents of the carrier that other cars would not be provided, loaded his cattle on the cars, and they were injured by the defects therein, the carrier was liable, though the contract of shipment provided that the carrier should not be liable for injuries to the stock caused by defects in the cars.—*Potts v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 394.

**App. 1885.** Under a contract for the shipment of live stock, making it the shipper's duty to load the car, it is his duty to close the car doors, and to notify the railroad's servants, when he sees that they are about to start in ignorance of the fact that he has not fastened the door.—*Newby v. Chicago, R. 1. & P. Ry. Co.*, 19 Mo. App. 391.

**App. 1887.** Where a shipper of cattle, preparatory to their transportation, and in obedience to the contract for shipment and the directions of the carrier, placed the cattle in the carrier's stock pens, the fact that the shipper thought the pens not thoroughly se-

cure at the time, is not such evidence of contributory negligence as to justify a demurrer to the evidence.—*Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473.

**App. 1889.** Although the shipper of horses through his agents assumed the duty of loading the horses, yet, if his agents left them in such a manner that the car obviously could not be moved with safety to the horses, and notwithstanding this the car was moved and one of the horses was injured, the carrier would be liable on the ordinary rule of negligence.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1903.** A shipper of live stock put in the carrier's pens for shipment, having relieved their distress, when apprised of it, by giving them water, is not barred from recovery because of not having avoided the injury by getting water for them himself when they were first put in the pens.—*Lackland v. Chicago & A. Ry. Co.*, 74 S.W. 505, 101 Mo. App. 420.

A shipper of live stock is not guilty of contributory negligence in putting them in the pens furnished by the carrier therefor till they are loaded for transportation, unless they are so obviously unsafe as to make it reasonably certain that injury to the animals must inevitably result.—*Id.*

**App. 1906.** Where, in an action for injuries to sheep because of the carrier's failure to provide doubledeck cars to accommodate the whole band, plaintiffs, who were experienced shippers, took out of the cars furnished 50 sheep more than was necessary to relieve over-crowding, knowing that such sheep would necessarily deteriorate in weight and appearance while being kept in the pens waiting for another car, plaintiffs could not recover damages against the carrier for such deterioration.—*Ficklin & Son v. Wabash R. Co.*, 92 S.W. 347, 115 Mo. App. 633.

**App. 1907.** Where plaintiff shipped certain hogs over defendant's railroad to a fine stock show, he did not assume the risk of the exposure of the hogs to cholera in an infected zone wherein he knew cholera to exist, where there was no necessity for diverting the car containing the hogs into such infected zone.—*Council v. St. Louis & S. F. R. Co.*, 100 S.W. 57, 123 Mo. App. 432.

**App. 1920.** In an action for damages to a jack shipped, that a clause requiring the shipper to accompany and take care of the stock while in transit was not complied with



*held* not to absolve the carrier from liability.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App. 1921.** A shipper of live stock does not assume the risk thereto from dirty cars, though knowing of their condition before loading, unless he knew of the danger, and there were other suitable cars reasonably available.—*Rhodes v. Missouri Pac. R. Co.*, 234 S.W. 1026.

217(2). Proximate cause of loss or injury.

**App. 1906.** Where plaintiffs, who were experienced shippers of live stock, knew before they began loading certain cars with sheep, that the cars were too small, but voluntarily took the risk of overcrowding, by which five of the sheep were killed, presumably from suffocation before the transportation was begun, the proximate cause of the death of such sheep was the negligence of the plaintiffs.—*Ficklin & Son v. Wabash R. Co.*, 92 S.W. 347, 115 Mo. App. 633.

217½. Claims for damages.

*See explanation, page iii.*

218. Limitation of liability.

Admissibility of evidence, *see post*, 228.

Carriage of goods, *see ante*, 147–168, 180.

Evidence, *see post*, 228.

Injuries to persons accompanying stock, *see post*, 307.

Instructions, *see post*, 230.

Questions for jury, *see post*, 230.

What law governs, *see ante*, 203.

218(1). Power to limit liability in general.

**Sup. 1877.** A common carrier cannot relieve himself by special contract from the responsibility which he incurs at common law for the exercise of due diligence. He is required to exercise the highest degree of care exacted by common law.—*Clark v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 440.

**Sup. 1877.** Where a contract of shipment of cattle exempted the carrier from liability for any loss by suffocation, plaintiff was entitled to recover for hogs that died by suffocation, if the suffocation was traceable to unnecessary or negligent delay of the train.—*Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 569.

**Sup. 1883.** A contract for the transportation of live stock by a common carrier, whereby the shipper agreed to assume the risk of all injuries to the live stock from de-

lays in the transportation, relieved the carrier from liability for losses which resulted solely from delay not caused by the negligence of the carrier and its servants; but for all losses resulting from delay caused by such negligence the carrier was liable.—*Dawson v. Chicago & A. R. Co.*, 79 Mo. 296.

**Sup. 1884.** A common carrier may limit his common-law liability in respect to the carriage of live stock by a special contract, but cannot exempt himself from the consequences of his own negligence.—*Ball v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 574.

**App. 1876.** It is competent for a railroad, in the carriage of cattle, to limit its common-law liability by special contract; but it cannot shield itself by special contract from liability for its own carelessness and neglect.—*Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

**App. 1889.** It is a settled law of this state that a common carrier cannot, by contract with the shipper, exonerate himself from liability for the negligence of himself and servants in the performance of the duty which he has undertaken.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1895.** Where a contract for the shipment of cattle provided that plaintiff, the shipper, agreed, in consideration of a reduced freight rate and the transportation of two men, to take charge of the cattle while in transit and to feed and water them, plaintiff cannot recover for damages caused by a want of proper feeding and watering.—*Holloway v. Wabash R. Co.*, 62 Mo. App. 53.

**App. 1898.** A railway carrier and a shipper may on a consideration make an agreement as to the value of live stock shipped which will bind the shipper and control his recovery in case of loss.—*Bowring v. Wabash Ry. Co.*, 77 Mo. App. 250.

**App. 1899.** Where there was a contract which placed plaintiff in charge of his cattle while being transported by defendant, and which purported to exempt defendant from liability for injury from heat, defendant is nevertheless liable for any overheating which was occasioned by its negligence.—*Minter v. Chicago, R. I. & P. Ry. Co.*, 82 Mo. App. 130.

**App. 1901.** A common carrier has the right to stipulate in its contract of carriage that it will not be liable for loss of carriage from loading or unloading.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

**App. 1901.** Though a contract of shipment provided that animals should be in the sole charge of persons in whose charge the shipper put them, the company not being responsible for lack of attention or care, it would not exempt it from liability for a wrongful act of one of its employes, which injured or killed the stock; but it should not be held liable on a mere conjecture that such an act was committed.—*Schureman v. Chicago, B. & Q. Ry. Co.*, 88 Mo. App. 183.

**App. 1905.** A contract by a shipper, in consideration of a reduced rate, exempting a carrier from liability by failure to deliver stock in time for the market of a certain day, is reasonable and enforceable.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 87 S.W. 9, 112 Mo. App. 610.

**App. 1906.** A provision in a contract for the shipment of cattle, whereby the carrier was not bound to deliver the cattle at destination at any particular hour, or in season for any particular market was a reasonable and valid one.—*Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

**App. 1915.** A contract for the interstate transportation of live stock, which declares that the carrier is not responsible for loss from defect in cars, and that the rate is lower than at the carrier's risk, is within the Carmack Amendment and valid.—*Thomas Bros. v. St. Louis & S. F. R. Co.*, 173 S.W. 96, 188 Mo. App. 22.

**App. 1915.** A carrier of live stock may escape liability for injuries resulting from an act of God, or the public enemy, the fault of shipper, or the inherent vice of the animals.—*Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746. See Carriers, ☞205 in this Digest.

**App. 1916.** A stipulation between carrier and shipper of live stock in interstate commerce limiting the time for bringing suit for injury thereto is valid under the federal rule.—*Howard v. Chicago, R. I. & P. Ry. Co.*, 184 S.W. 906.

**App. 1919.** In view of General Statutes of Kansas 1915, § 8435, under the order of May 1, 1901, of the Board of Railroad Commissioners of Kansas, where the intrastate shipper of a stallion in Kansas declared a valuation, and so obtained a lower rate, provision in shipping contract limiting liability to amount of declared valuation was valid, and shipper cannot recover in excess of the amount.—*Strother v. Atchison, T. & S. F. R. Co.*, 212 S.W. 404.

**App. 1920.** That the shipper of live stock bottoms his cause for damages on breach of the carrier's common-law duty to furnish cars on reasonable notice does not prevent the consequences of an agreement, supported by valuable consideration, whereby such damages are waived.—*Coleman v. Hines*, 217 S.W. 602.

**App. 1922.** A live stock carrier could not relieve itself from liability for failure to deliver the live stock in a safe and sound condition by stipulation in contract that it would not be liable except for negligence, under Interstate Commerce Act, § 20, as amended.—*Sullivan v. American Ry. Express Co.*, 245 S.W. 375, 211 Mo. App. 123.

**App. 1922.** In an action for injury on a shipment of a buffalo, refusing to admit a contract of shipment, which relieved defendant from its common-law liability save as to negligence was not error.—*Johnson v. American Ry. Express Co.*, 245 S.W. 1071.

**App. 1923.** A carrier cannot exempt itself from liability on account of negligence, and a contract exempting a carrier from liability for loss by reason of a violation of the so-called 36-hour law is void.—*Johnson v. Wabash Ry. Co.*, 251 S.W. 719.

**App. 1924.** Notwithstanding Carmack Amendment (49 USCA § 20), carrier may reasonably contract in limitation of its strict common-law liability.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

**App. 1925.** Carrier had right to protect itself by contract against liability for delay in shipment of live stock caused by shopmen's strike.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

**App. 1927.** Carrier could not exempt itself from liability for loss resulting to shipper of live stock because of strike of employees (Interstate Commerce Act, § 20, as amended by Carmack Amendment and First Cummins Amendment [49 USCA § 20, par. 11]).—*Frawley v. Atchison, T. & S. F. R. Co.*, 209 S.W. 93, 220 Mo. App. 1189.

#### ☞218(2). Power to limit extent of liability.

**Sup. 1884.** A stipulation in a contract for the carriage of live stock that, in case of injury to the cattle by reason of delay in their transportation, the carrier shall be liable in damages for no more than the actual amount expended by the shipper in the purchase of food and water, does not control the measure

of damages, where the delay is caused by the negligence of the carrier.—*Ball v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 574.

**Sup. 1915.** Limited liability contract for interstate transportation of live stock based on declared value *held* not void if fair, open, just, and reasonable.—*Donovan v. Wells Fargo & Co.*, 177 S.W. 839, 265 Mo. 291.

Contract limiting carrier's liability to declared value of horse *held* not a violation of the Interstate Commerce Act, and carrier not liable for full value, though it knew the full value, which largely exceeded the declared value.—*Id.*

**App. 1894.** Where it appeared that plaintiffs paid full first-class freight for the shipment of the jack injured, an instruction that plaintiff's recovery should be limited to \$100, as fixed by the contract of shipment, was properly refused.—*Crow v. Chicago & A. R. Co.*, 57 Mo. App. 135.

**App. 1904.** A carrier cannot limit its liability for damages arising from delay in transportation of live stock, caused by its negligence, to the extra cost of feeding and watering the stock.—*Botts v. Wabash R. Co.*, 80 S.W. 976, 106 Mo. App. 397.

**App. 1907.** A provision in a contract for the shipment of cattle, exempting the carrier from liability for injuries resulting from delay, except for the amount expended by the shipper in the purchase of food and water, is invalid, when the cause of delay is the negligence of the carrier.—*Davis v. Wabash Ry. Co.*, 99 S.W. 17, 122 Mo. App. 637.

**App. 1916.** A bill of lading for an interstate shipment providing that, in consideration of a reduced rate, a shipper of live stock should not recover more than \$100 for each horse or mule killed is valid.—*Jones v. Louisville & N. R. Co.*, 182 S.W. 1064.

**218 (3). Power to impose conditions with regard to giving notice of loss.**

**Sup. 1876.** A stipulation by a carrier that "no claim for loss or damage on live stock will be allowed, unless the same is made in writing, before or at the time the stock is unloaded," is not unreasonable and void.—*Rice v. Kansas Pac. Ry.*, 63 Mo. 314.

**Sup. 1882.** A contract made by a carrier of live stock, providing that the shipper shall take care of the cattle while transported, and load and unload the same at his own risk, and that any claim for damages shall be made

in writing within five days after the live stock shall have been unloaded or delivered at the point of destination, is valid, and exempts the carrier from its common-law liability, except for its negligence or misconduct.—*Dawson v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 514.

**Sup. 1908.** A railroad company may, for a lawful consideration, contract with the shipper that it shall not be liable for delay in shipments or for loss or injury to stock, unless notice thereof is given within a certain time.—*George v. Chicago, R. I. & P. Ry. Co.*, 113 S. W. 1009, 214 Mo. 551, 127 Am. St. Rep. 690.

**App. 1886.** Where a contract for the shipment of live stock provided that the railroad company should not be liable for damages, unless a claim should be made out, verified by affidavit, and delivered to the general freight agent within five days, the shipper was not entitled to recover for damage to the stock, unless written notice was given as required by contract.—*McBeath v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 445.

**App. 1906.** A provision in a contract for the transportation of live stock that no claim for a loss should be allowed unless a written claim therefor was made within 10 days from the time the stock was removed from the cars was valid, so that the shipper could not recover for loss where no notice was given till 3 months had elapsed.—*Bellows v. Wabash R. Co.*, 94 S. W. 557, 118 Mo. App. 500.

**App. 1908.** It is no defense to an action for breach of a verbal contract to furnish cars that the shipper failed to give written notice of his claims for damages within 10 days, as provided by the bill of lading under which the stock was shipped subsequently to the breach of the oral agreement, and such defense is properly stricken from the answer.—*Meriwether v. Quincy, O. & K. C. R. Co.*, 107 S. W. 434, 128 Mo. App. 647.

Where a petition seeks damages for injuries to live stock occurring during a delay in transit, it is a good defense to the action that the shipper failed to comply with the bill of lading under which the stock was shipped, requiring a written claim for damages to be made within 10 days after delivery of the shipment, unless there was some good reason for failure to make the claim, and such defense was erroneously stricken from the answer.—*Id.*

**App. 1908.** A contract for the shipment of hogs, which stipulates that, as a condition precedent to recovery for delay, the shipper

will give notice to the carrier before the shipment is removed from the place of destination, and before the same is mingled with other stock, and that such notice must be served within one day after the delivery of the shipment at destination, will be enforced as a reasonable provision, where the facts regarding a failure to give notice within the time fixed are not sufficient to suggest the application of the provision as unreasonable, and where nothing was done until some days after the hogs were actually unloaded by the shipper's agents, and commingled with other hogs and sold on the market.—*Shelton v. St. Louis & S. F. R. Co.*, 110 S. W. 627, 131 Mo. App. 560.

**App. 1908.** A contract by a shipper, in consideration of a reduced rate exempting a carrier from liability, unless a written, verified notice of the loss or injury be mailed to the general freight agent of the company within 10 days from the time of unloading, is reasonable and valid.—*Letts v. Wabash R. Co.*, 111 S. W. 138, 131 Mo. App. 270.

**App. 1909.** A carrier of live stock may stipulate that notice of claim for loss be given by the shipper as condition precedent to liability.—*Aull v. Missouri Pac. Ry. Co.*, 116 S. W. 1122, 136 Mo. App. 291.

**App. 1910.** A special contract by the shipper in consideration of a reduced rate, requiring him to give notice to some general officer of the carrier or the nearest station agent, or agent at destination, of delay, etc., en route before removal of the stock from the point of shipment and one day after delivery of the stock at destination, and making failure to comply therewith a bar to any claim for delay, is valid.—*Moore v. St. Louis & S. F. R. Co.*, 127 S. W. 921, 143 Mo. App. 675.

**App. 1911.** Under Code Iowa, § 2074, providing that no contract shall exempt any carrier from the liability existing had no contract been made, a stipulation in a contract executed in Iowa for transportation of live stock from a point in Iowa to a point in Missouri, which requires notice of a claim for loss within a specified time, is invalid.—*McKinstry v. Chicago, R. I. & P. Ry. Co.*, 134 S. W. 1061, 153 Mo. App. 546.

The stipulation is invalid under the provisions of the amendment to the interstate commerce act known as the Hepburn Bill (Act June 29, 1906, c. 3501, § 7, 34 Stat. 595), prohibiting a carrier from contracting with a shipper for interstate transportation of freight, where the contract affects any part of the carrier's common-law liability.—*Id.*

**App. 1913.** A stipulation in a contract for the shipment of live stock, requiring that, as a condition precedent to any right to recover for loss or injury to the live stock, written notice of a claim therefor shall be given before said live stock is removed or intermingled with other live stock, is reasonable and valid.—*McElvain v. St. Louis & S. F. R. Co.*, 158 S. W. 464, 176 Mo. App. 379.

**App. 1914.** Stipulations as to interstate shipments, requiring notice of claims for damages to live stock, *held* valid.—*Hamilton v. Chicago & A. R. Co.*, 164 S. W. 248, 177 Mo. App. 145.

**App. 1914.** A stipulation in a contract for the shipment of live stock as to serving of notice of loss within one day after delivery at destination *held* not unreasonable under the facts.—*Riddler v. Missouri Pac. Ry. Co.*, 171 S. W. 632, 184 Mo. App. 709.

**App. 1914.** A stipulation, in a contract for interstate carriage of live stock, as to notice of loss *held* valid, and a shipper giving notice after the expiration of the time limit may not recover.—*Smith v. St. Louis Southwestern Ry. Co.*, 171 S. W. 635, 186 Mo. App. 401.

**App. 1915.** Plaintiff's failure to comply with requirements of interstate shipment contract as to notice of damage, and as to a written claim, *held* valid defenses.—*Potter v. Kansas City Southern Ry. Co.*, 172 S.W. 1153, 187 Mo. App. 56.

**App. 1915.** A provision, in a contract for interstate transportation of live stock, that notice of damages must be given within 5 days after unloading, is reasonable, and failure to give notice bars a recovery.—*Dunlap v. Chicago & A. Ry. Co.*, 172 S.W. 1178, 187 Mo. App. 201.

**App. 1916.** Where hogs were shipped by rail at a limited liability rate, approved by the Public Service Commission, instead of at a common-law liability rate, provision in shipping contract requiring shipper to give notice of claims for damages, within ten days at the most, was enforceable.—*Hull v. Chicago Great Western R. Co.*, 185 S.W. 1155, 193 Mo. App. 425.

**App. 1916.** A bill of lading provision, requiring written notice of claim for damages to carrier within a certain time after live stock is delivered and before mingled with other stock, is valid.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282.

**App. 1917.** Provision in contract for interstate shipment of live stock, that shipper should give written notice of any claim for damages to carrier's agent before removing stock from destination or place of delivery, and before mingling it with other stock, is enforceable.—*O'Briant v. Pryor*, 195 S.W. 759.

**App. 1920.** Provisions of a bill of lading covering an interstate shipment of live stock requiring notice of loss or injury to be given in writing, and notice that claim would be made filed within 95 days, and verified itemized claim filed within 125 days were valid, in view of Interstate Commerce Act, § 20, as amended (49 USCA § 20).—*Cunningham v. Missouri Pac. R. Co.*, 219 S.W. 1003.

**App. 1920.** A provision in a contract between a shipper and a carrier for the shipment of live stock, requiring notice in writing of injury sustained during shipment, *held* valid, where supported by good and valid consideration.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

218 (4). Power to impose duties on shipper as to care of stock.

**App. 1915.** Provisions of shipping contract that live stock was not to be transported within any specific time and was to be fed by shipper *held* valid, except as to negligence, liability for which was not changed by the interstate commerce act as amended.—*Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639.

218 (5). Validity of contract granting exemption.

**Sup. 1883.** Where a shipper delivered stock to a carrier for transportation, and accepted a special contract limiting the liability of the carrier, he was bound to examine and ascertain its contents, and, in the absence of fraud or mistake, the writing must be taken as the sole evidence of the final agreement of the parties; and it is immaterial that the contract was presented to him for his signature after the cattle were loaded and at a time too late for him to examine its provisions, unless there was fraud or mistake.—*St. Louis, K. C. & N. Ry. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13.

**Sup. 1896.** A contract for the shipment of an animal which fixes no charge to be paid therefor, leaving the schedule rate to govern, and which states that the animal's value does not exceed \$50, and the carrier shall not be liable beyond that amount in case of loss or damage through its negligence, is not such a contract as fixes an agreed value on which to

base both a rate of transportation and the liability for loss, but, in case of loss, leaves the actual value of the animal to be shown by extrinsic proof; and the provision limiting the liability of the carrier is void for want of consideration.—*Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 37 S.W. 828, 136 Mo. 177, adopting opinion by court in banc, 34 S.W. 41, 136 Mo. 177.

**Sup. 1908.** A contract signed by a shipper of stock whereby the company was not to be liable for delay in transportation, or for loss or injuries, unless notice was given within one day after delivery, was not binding upon the shipper where there was no consideration for the agreement, though the contract recited that the rate charged was less than that charged for shipments at the carrier's risk.—*George v. Chicago, R. I. & P. Ry. Co.*, 113 S.W. 1099, 214 Mo. 551, 127 Am. St. Rep. 690.

**Sup. 1915.** Shipper's agent who delivered horse to carrier *held* to have authority to bind the shipper by executing a limited liability contract based upon the declared value of the horse; the shipper being charged with knowledge that such contract was a requisite of shipment at the rate given.—*Donovan v. Wells Fargo & Co.*, 177 S.W. 839, 265 Mo. 291.

**Sup. 1917.** Where schedule of railroad's rates for carrying stock contains two rates, one, lower, where contracts limiting liability must be entered into, another, higher, where no such contract is required, difference between rates is consideration for contract limiting liability.—*Bilby v. Atchison, T. & S. F. Ry. Co.*, 199 S.W. 1004.

Provision in railroad's schedule of rates for carrying live stock, joint with other railroads, *held* to authorize contract covering interstate shipments in form of several blanks of several companies to which joint schedule applied.—*Id.*

Shipper of live stock, having duly executed contracts with railroad, in law had knowledge of their contents, and fact that copy given to shipper's agent in charge of train of cattle was taken up at end of trip, like ticket, did not excuse failure to comply with condition precedent.—*Id.*

**Sup. 1923.** An interstate shipper did not waive right to damages for delay in furnishing stock cars by a provision in the subsequent bill of lading that all prior contracts relating to the manner of receipt or transportation of the live stock described herein, or furnishing cars therefor, are hereby waived

and merged in this agreement, it not being within the power of the carrier under the Carmack Amendment to the Interstate Commerce Act (49 USCA § 20) to make a contract exempting it from liability for damages resulting from its own negligence or unlawful act in the handling of interstate business.—*Howell v. Hines*, 249 S.W. 924, 298 Mo. 282.

**App. 1885.** An agreement, signed by a shipper of live stock, providing that the carrier shall not be liable for more than \$100 on account of the loss of any one animal, is a valid contract, binding upon the parties, although the shipper did not know, at the time he signed the contract, that it contained such limitation of liability.—*Brown v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 568.

**App. 1889.** A special contract between a shipper of stock and a carrier, limiting the latter's liability, cannot be set up by the carrier in defense of the shipper's action to recover the value of the stock killed, unless the contract was in fact signed at the time the stock was killed.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1895.** Cattle were shipped under a contract providing that, in case of any unusual delay or detention of the cattle from any cause whatever, the plaintiff was to accept, as full compensation for all loss or damage sustained in consequence of such delay, the amount actually expended by them in the purchase of food and water for the stock aforesaid. *Held*, that such contract was invalid, it being practically an exemption from the entire liability of the carrier for its negligence, and is unfair, unjust, and unreasonable, and hence it was error to limit plaintiff's recovery to such sum.—*Vaughn v. Wabash Ry. Co.*, 62 Mo. App. 461.

**App. 1895.** Where contract for shipment of hogs, limiting the valuation of the hogs, was invalid for want of consideration, the plaintiff was not limited to the valuation fixed in the contract, but could show their true value.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

Where the rate of freight charged in a contract of shipment limiting the carrier's common-law liability was less than the maximum rate allowed by statute, the difference in rates did not constitute a consideration for the release from liability; the carrier not having adopted such maximum rate for shippers who declined the contract releasing liability.—*Id.*

Where a carrier had a higher rate of freight than that charged in a contract releasing much of its common-law liability, but such rate was not posted in its depots for public inspection, as required by Rev. St. 1889, § 2639, there was no consideration for the release from liability.—*Id.*

Where, in an action for damages to hogs shipped over defendant's railroad, the defense was that the plaintiff had signed a contract of shipment releasing the defendant from liability in consideration of a reduced rate of freight, but the evidence showed that the higher rate charged for shipments without the release of liability was greater than the maximum rate fixed by statute, the contract releasing liability was void for lack of consideration.—*Id.*

**App. 1896.** In an action for damages for breach of a verbal contract by which defendants undertook to receive and ship cattle, the defense interposed was that plaintiffs and defendants entered into a written contract for the shipment of the cattle, in which there was a clause to the effect that plaintiffs released any cause of action for damages that might have accrued on any prior contract. When plaintiffs offered their cattle for shipment, defendants proposed to charge them a rate of 150 per cent. of the rate named in the freight tariff, unless plaintiffs would enter into a special contract releasing existing causes of action under any prior contract, but, in case of such release, to carry the cattle at the regular rate named in the freight tariff. The maximum rate of 150 per cent. of the rate named in the regular freight tariff would exceed the maximum allowed under Rev. St. §§ 2674, 2675. Plaintiffs accepted the latter proposition and executed the release. *Held*, that the rate charged was not the reduced rate, and therefore there was no consideration for the release.—*Wilson v. Missouri Pac. Ry. Co.*, 66 Mo. App. 388.

**App. 1898.** In an action for the loss of live stock, where the answer alleged that there was a lesser rate of \$47, and the proof was that plaintiff paid \$51.70, but the answer alleged that the \$47 rate was for standard cars, and plaintiff had a stable car which was considerably longer than the standard car, it may be fairly inferred that the difference between the rates arose out of the difference in the length of the cars, and that therefore the rate exacted was not illegal.—*Wyrick v. Missouri, K. & T. Ry. Co.*, 74 Mo. App. 406.

If a shipper did not know the contents of a contract for transportation, and if the time

intervening between the loading of the live stock and the starting of the train was so short as not to afford him a reasonable opportunity to read the contract and acquaint himself with its contents, he should have rejected and refused to sign it, and, if he elected to sign it, he cannot be permitted to evade its terms on the ground that he did not know its contents.—*Id.*

**App. 1899.** A contract for the shipment of cattle provided that all damages caused by delay should be compensated by the repayment to the shipper of the sums expended by him for food and water for the cattle. In consideration of this exemption the carrier gave the shipper a reduced rate. The shipment was delayed, but not through the negligence of the carrier. *Held*, that the shipper was bound by the exemption.—*Vaughn v. Wabash Ry. Co.*, 78 Mo. App. 639.

**App. 1901.** A special reduced rate is a sufficient consideration for the release of a carrier from liability in excess of the valuation declared by the shipper of cattle.—*Bowring v. Wabash Ry. Co.*, 90 Mo. App. 324.

**App. 1903.** A stipulation, in a contract of shipment of cattle, that in case of loss the value should be fixed as at the time and place of shipment, is valid, though there is nothing to show that the transportation was at a reduced rate.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1904.** The granting of rates specified in a schedule filed with the Interstate Commerce Commission is not a consideration for a contract limiting the railroad company's liability for delay in the transportation of live stock, though the company had a schedule of other and higher rates which was not filed with the commission.—*Summers v. Wabash R. Co.*, 79 S.W. 481, 114 Mo. App. 452.

**App. 1904.** Where a shipper of cattle estimated the weight to the carrier at 1,200 pounds each, but the carrier's agent made an independent estimate of 1,100 pounds, and on his own motion incorporated such estimate in the contract of shipment, on which weight the freight rate was based, the carrier was estopped to claim that, by reason of the fact that the cattle overran the estimated weight, the shipment was made at a reduced freight rate, which entitled the carrier to limit its common-law liability.—*Rice v. Wabash R. Co.*, 80 S.W. 974, 106 Mo. App. 371.

In the absence of a special consideration therefor, a provision in a bill of lading for the shipment of cattle that the shipper, in consideration of the rate named, agreed to water and feed the stock at his own expense, and, in the event of any unusual delay or detention, the shipper agreed to accept as full compensation for any loss or damage the amount actually expended by him in the purchase of feed and water for the stock shipped, was unenforceable.—*Id.*

**App. 1904.** Where there is no evidence of a reduction in the rate charged for a shipment of live stock, there was no consideration for the limitation of the carrier's liability in the contract, and such limitation is no defense in an action for delay in transportation.—*Sloop v. Wabash R. Co.*, 84 S.W. 111, 117 Mo. App. 204.

**App. 1905.** Contracts between a shipper and carrier, fixing the value of the shipment to liquidate damages in case of injury, in order to be valid, must be entered into by the shipper before or at the time the goods are delivered for transportation.—*Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co.*, 87 S.W. 553, 113 Mo. App. 144.

**App. 1906.** Where a live stock transportation contract limited defendant's liability in consideration of a "reduced rate," but it appeared that defendant had but one rate for the carriage of the stock between the points in question, such contract in so far as it attempted to limit defendant's liability, was without consideration and would be treated as an ordinary bill of lading, on which defendant was bound to perform the common-law obligations of a common carrier.—*Ficklin & Son v. Wabash R. Co.*, 92 S.W. 347, 115 Mo. App. 633.

**App. 1906.** A carrier's cattle contract provided that the cattle were valued at \$50 a head and were shipped subject to the rules of the company and of the schedule of valuation and weights; such valuation being named by the shipper "both for the purpose of securing a reduced freight rate" and that, in case of loss or injury to the cattle, the liability of the carrier should not exceed the amount per head so stated. The carrier had no other rate than that charged for the shipment of cattle of such valuation between the points in question, but did have higher rates, for cattle of higher proportionate value, and also had but one form of contract which provided a limited liability. *Held*, that such contract was ineffective to limit the car-

rier's liability.—*Ficklin v. Wabash R. Co.*, 93 S.W. 847, 117 Mo. App. 221.

**App. 1906.** A provision in a contract for the shipments of live stock limiting the amount of recovery by the shipper in a case of loss is invalid, where the carrier's liability is based on negligence, and there is no showing that the shipper received a lower rate as consideration for the limitation.—*Jones v. Quincy, O. & K. C. R. Co.*, 94 S.W. 735, 117 Mo. App. 523.

**App. 1906.** A stipulation in a contract for the shipment of cattle that, in case of any delay, the amount expended for the purchase of food in consequence thereof should be full compensation for the delay, in consideration of a reduced rate, was supported by a good consideration.—*Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

**App. 1908.** A reduced rate for carriage is a sufficient consideration to support an agreed valuation of freight in the event of loss.—*Hancock v. Chicago & A. Ry. Co.*, 111 S.W. 519, 131 Mo. App. 401.

A contract of shipment of horses, providing that the carrier would transport the horses "at the rate of Trf. per cwt.," that rate being less than the rate charged for transportation at the carrier's risk, or when the valuation was declared to be greater than that given therein, named no rate as a reduced rate; for, if the expression, "at the rate of Trf. per cwt.," be interpreted as at the tariff rate per hundred pounds, it is still not a named rate, where there is nothing to show the tariff rate.—*Id.*

A contract of shipment of horses, providing that the carrier would transport the horses "at the rate of Trf. per cwt.," that rate being less than the rate charged for transportation at the carrier's risk or when the valuation was declared to be greater than that given therein, cannot be made to apply to the shipment in question, since it was a shipment of horses as such, without regard to weight, so as to support the defense of agreed valuation, in the event of loss, in consideration of a reduced rate.—*Id.*

**App. 1909.** The contract of carriage of a horse, the value of which is therein recited to be \$100, though reciting that the rate charged is a reduced one, and though a higher rate is charged on horses of a greater declared value, does not charge a reduced rate, so as to authorize a limitation of its common-law liability; the rate charged being the

only one offered for horses of a declared value of \$100.—*Creel v. Missouri Pac. Ry. Co.*, 119 S.W. 30, 137 Mo. App. 27.

**App. 1909.** A carrier's rules, printed on live stock contracts, permitted free transportation for only three men to accompany 11 cars of cattle, or more, but provided for free transportation for one man to accompany 1 car. Plaintiff shipped 13 cars, and, in order to obtain transportation for more than three men, shipped 2 cars in his own name, and the remaining 11 in the names of six other persons; the contracts for the cars being executed by plaintiff in the names of the persons who accompanied him and the cattle. *Held*, that the fact that plaintiff thereby obtained transportation for more men than he was entitled to, which was equal in value to a considerable sum of money, was not a consideration for a limited liability contract, providing for notice of loss within 10 days, under the rule that the consideration for a contract must rest in a mutual agreement.—*Burgher v. Wabash R. Co.*, 120 S.W. 673, 139 Mo. App. 62.

**App. 1910.** A contract for the carriage of live stock by a railroad company, reciting that the rates charged are classified according to the value of the animals, a higher rate being charged for those shown by the shipper's statement to be of a value more than \$100 than for those of a less value, and limiting the railroad's liability for injuries to the value stated by the shipper, does not show a valid consideration for the limitation to \$100 per head, the amount stated by the shipper as the value of his stock.—*Van Buskirk v. Quincy, O. & K. C. R. Co.*, 128 S.W. 216, 143 Mo. App. 707.

An agreement in a shipping contract limiting the liability of the carrier to a stated valuation of the property is valid if supported by a valid consideration, such as a reduced rate, but not without a special consideration.—*Id.*

**App. 1910.** Where the trial court found that the rate charged was the usual rate for shipment of mules between the same points, and there was evidence to support the finding, no consideration was shown to support a contract releasing the carrier from liability, or for an agreed valuation of the animals at less than their real valuation, though the contract of shipment stated the rate was the tariff rate, and less than the rate for transportation at carrier's risk.—*Harrington v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 807, 143 Mo. App. 418.



**App. 1910.** A written application to a carrier for shipment of live stock at a reduced valuation in consideration of a reduced rate, followed by the carrier's signed acceptance of the shipment at such valuation, and followed by an agreement for the transportation, all written on the same piece of paper, constituted one contract supported by one consideration.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

In an action by a shipper under a contract to carry live stock, reported to have been made at a reduced rate in consideration of a reduced valuation, it could be shown that there was only one rate, and hence no reduced rate.—*Id.*

**App. 1910.** A special contract for carriage of live stock, which provides for a reduction of common-law liability on the part of the carrier, must be supported by a consideration to be valid, and, if the consideration is recited to be a reduced rate, the rate must be in fact a reduced one; and hence where a bill of lading which reduced the carrier's liability recited that such reduction was in consideration of a reduced freight rate, and also recited that the rate charged was the tariff rate, the tariff rate being the maximum rate possible, there was no reduction in charges, and the agreement was invalid for lack of consideration.—*Besheer v. St. Louis & S. F. R. Co.*, 131 S.W. 767, 151 Mo. App. 80.

**App. 1910.** A shipping contract reciting that the charge for transportation of the horse was at the rate of ——— tariff per cwt., and that, in case of loss, the carrier's liability should be limited to a certain amount, did not show consideration for the limitation of value, since there was no reduction in the rate, though the contract recited that it was less than the rate charged for shipments at the carrier's risk.—*Burns v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 1, 151 Mo. App. 573.

A shipping contract reciting that the charge for transportation of the horse was at the rate of ——— tariff per cwt., said rate being less than charged for shipments at carrier's risk, and that in case of loss a recovery could be had for the cash value of the property at the time and place of shipment, but in no case to exceed a certain amount, did not show a consideration for the limitation of value, where the contract did not show that the horse had been weighed, but instead a lump charge was paid for the transportation.—*Id.*

**App. 1910.** Where there was no valid reduced rate in a carrier's contract for the ship-

ment of animals, a provision limiting the carrier's liability was unsustainable for want of consideration.—*Grant v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 311.

**App. 1911.** Where a carrier had one rate on horses valued at \$100, which was the regular tariff rate, and the contract of shipment attempted to differentiate that rate into a reduced rate, by comparing it with higher rates charged for horses of higher value, such a comparison is improper, and it will not serve as a consideration for a limited valuation clause.—*Leas v. Quincy, O. & K. C. R. Co.*, 136 S.W. 963, 157 Mo. App. 455.

**App. 1912.** Provision in a contract of shipment of horses, limiting the carrier's liability to \$100 per head for the horses, is invalid, notwithstanding a recital therein that the shipper acknowledged he had the option of shipping at the carrier's risk, at a higher rate, and accepted the lower rate; the undisputed evidence being that he had no such option, but part of the horses having been loaded in the car furnished before he went to see the agent about the contract, and then, according to his testimony, he being plainly told by the agent that if the horses were to be shipped over that road he would have to sign that contract, and that it was the regular contract that all shippers were required to sign; and the agent's testimony being that he simply tendered him the regular contract that he tendered everybody, and that he signed it, as everybody did, "on the jump."—*Blankenship v. St. Louis & S. F. R. Co.*, 142 S.W. 471, 160 Mo. App. 631.

**App. 1914.** One shipping cattle under a contract providing that, for the consideration contained therein, the carrier agreed to transport at the rate named, which was less than when the valuation was declared to be greater than that declared, subject to the conditions specified, is deemed to have assented to the provisions of the contract, including one requiring notice of claim for damage.—*Hamilton v. Chicago & A. R. Co.*, 164 S.W. 248, 177 Mo. App. 145.

**App. 1915.** A stipulation in a contract for interstate transportation of live stock, requiring notice of damages, is enforceable, though unsupported by a consideration of a reduced rate.—*Dunlap v. Chicago & A. Ry. Co.*, 172 S.W. 1178, 187 Mo. App. 201.

**App. 1915.** Unless supported by an independent consideration, such as a reduction in freight rates, an agreement to give notice of loss within a short time cannot be sup-

ported.—*Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746, 191 Mo. App. 676.

A bill of lading *held* to show no reduction in rates affording a consideration to support a special contract.—*Id.*

**App. 1916.** A bill of lading provision, requiring written notice of claim for damages to carrier within a certain time after live stock is delivered and before mingled with other stock, requires no special consideration to support it.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282.

**App. 1918.** A provision in a contract of shipment of cattle, that the carrier does not assume any liability for live stock while remaining in pens awaiting shipment, is void as far as intended to relieve the carrier of negligence.—*Akeman v. Wabash Ry. Co.*, 201 S.W. 590.

**App. 1918.** Carrier's schedule of rates filed with the Public Service Commission, providing a certain rate per 100 pounds for sheep the declared value of which does not exceed \$5 each, with provision for a certain increase of rates for those the declared value of which is greater, furnishes no basis for limiting carrier's liability to declared value of \$5.—*Hull v. Chicago, B. & Q. R. Co.*, 208 S.W. 494, 200 Mo. App. 392.

**App. 1920.** In an action for injuries to a jack shipped, that the contract contained a statement limiting the liability of the carrier to \$100 could not operate to exempt the carrier from liability for injuries exceeding such amount; it not constituting a stipulation of the parties, but merely an arbitrary declaration on defendant's part.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App. 1922.** A contract to furnish cars for an interstate shipment is governed by federal law, and only the legal rate can be charged, and so a release therein of liability for delay in consideration of the rate is without consideration, and void.—*Grass v. St. Louis-San Francisco Ry. Co.*, 238 S.W. 551.

**App. 1928.** Shipper may remain silent as to value of animals shipped and recover full value for loss, unless carrier secures written agreement to released value (*Hepburn Act*, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Hunter v. American Ry. Express Co.*, 4 S.W.(2d) 847.

In absence of evidence that shipper of horses knew of bill of lading limiting value

until after injury to horse, he was not bound thereby (*Hepburn Act*, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Id.*

Evidence that shipper of horses did not know of bill of lading fixing released value until after injury to horse *held* to entitle him to recover actual damages (*Hepburn Act*, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Id.*

Shipper of horses, not knowing of bill of lading fixing released value before injury to horse, *held* not to have ratified it (*Hepburn Act*, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Id.*

Shipper, not knowing of contract for shipment, made by another, *held* not bound by released value fixed thereby (*Hepburn Act*, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Id.*

#### ☞ 218 (6). Operation and effect of limitations in general.

**Sup. 1886.** In an action against a railroad company to recover damages for the loss of sheep, caused by the negligence of defendant, where it appears that, in consideration of a reduction of freight rates, plaintiff agreed to take all risks of transportation, and to load and unload the sheep at his own expense and risk, and that the loss occurred by reason of the sheep being kept in the cars overnight after reaching their destination, *held*, that defendant is not liable, although the sheep were kept in the cars because the defendant refused to furnish men to herd the sheep during the night, and the stock pens were too small to hold them, when it further appears that defendant consented to ship the cars over a transfer track of another road to the stock pens of such other road, so that plaintiff could unload the sheep there, if the plaintiff would get the consent of the officers of that road to the use of the track for that purpose, and, on plaintiff's failure to get such consent, offered to haul the cars up to its own stock pens, so that plaintiff could unload the sheep there.—*Meyers v. Wabash, St. L. & P. Ry. Co.*, 2 S.W. 263, 90 Mo. 98.

**Sup. 1887.** A stipulation in a bill of lading or contract of shipment of live stock whereby the shipper assumed "the risk of loss or injury to the mules by fire or any account whatever" does not relieve the common carrier from his common-law liability for negligence.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 689, 92 Mo. 343, 1 Am. St. Rep. 721.

**App. 1885.** A contract, signed by the shipper of cattle, agreeing to release the carrier from all claim of damage or injury to the stock from any defects in the cars, does not exonerate the carrier from the duty to furnish suitable cars for the transportation of the cattle; and for injuries to the cattle from defects in the cars of which the carrier had notice it is liable.—*Potts v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 394.

**App. 1885.** Carriers are not responsible for injuries to animals resulting from their own inherent propensities, but are bound to provide suitable, safe, and secure cars for the transaction of their business; and a contract, though signed by the shipper, agreeing to release the carrier, will not exonerate him from the resulting damage, or from his implied duty to furnish suitable means to safely transact his business.—*Brown v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 568.

A contract for the shipment of live stock provided that the shipper agreed, as soon as the stock was placed in cars, to see that all the doors and openings in the cars were closed and fastened, and afterwards kept so, and that he released the carrier from all claims for damage or loss sustained in consequence of the escape of the stock through doors and openings in the car, or because of the crowding or fright of the animals, or from any defect in the doors or their fastenings. *Held*, that this release of liability did not extend to a loss of an animal caused by the fact that the car was not of sufficient strength to hold the animals.—*Id.*

**App. 1889.** Where plaintiff contracted with defendant railroad company, through its agent, to ship a horse, and, while plaintiff was loading the horse into a car through a chute provided by the railroad the same gave way, and the horse was injured, the making of a subsequent written contract and the terms of such contract could not deprive plaintiff of his rights that had already accrued under the parol contract.—*McCullough v. Wabash Western Ry. Co.*, 34 Mo. App. 23.

**App. 1889.** A clause in a shipping contract, "that the liability of the company for damage to valuable live stock shall not exceed \$100 for each animal, except on special agreement," was held not to limit the liability of the company for the loss of a horse, killed through the negligence of the company; there being no fraud or misrepresentation as to the real value of the horse on the part of the shipper at the time of making the con-

tract.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1891.** A bill of lading by which the carrier agrees to carry live stock to the point of destination only if it is on its own line, and which provides that each carrier shall be liable for loss on its own line, relieves the carrier from liability for the negligence of connecting carriers, notwithstanding the provisions of Rev. St. 1889, § 944, imposing on carriers which contract to transport goods beyond their terminus a liability for such negligence.—*F. A. Drew Glass Co. v. Ohio & M. Ry. Co.*, 44 Mo. App. 416.

**App. 1891.** A common carrier may, notwithstanding the provisions of Rev. St. 1889, § 944, agree to carry live stock to the terminus of its own route only, and stipulate for a cessation of its liability as a common carrier beyond that point.—*Historical Pub. Co. v. Adams Express Co.*, 44 Mo. App. 421.

**App. 1895.** Where a jack was shipped at a rate based on an arbitrary weight of 3,000 pounds, while horses and mules are shipped at a rate based on an arbitrary weight of 2,000 pounds, a limitation of liability for each horse and mule will not apply to the jack.—*Richardson v. Chicago & A. R. Co.*, 62 Mo. App. 1.

**App. 1895.** Where a shipment of cattle was made at a reduced rate under a contract relieving the carrier of responsibility for any loss or damage to the cattle while being loaded, forwarded, or unloaded, or for injuries sustained from suffocation, overloading or fright, or from crowding of the animals upon each other, and there was no evidence of negligence on the part of the carrier over the part of the route on which a steer was killed, there can be no recovery for the steer.—*Vaughn v. Wabash Ry. Co.*, 62 Mo. App. 461.

**App. 1896.** Where a carrier contracted to carry hogs, and the contract limited its liability to losses occurring on its own line, and the connecting carrier refused to receive the hogs, whereupon the carrier having charge of them placed them in pens, it thereby shifted its liability as carrier to that of custodian of the property or forwarding agent.—*Larimore v. Chicago & A. R. Co.*, 65 Mo. App. 167.

**App. 1898.** Where the recitals in a contract for transportation prima facie established that plaintiff shipped his animals in consideration of a special or reduced rate, and these recitals were not contradicted or overthrown by any evidence in the case, they

must be deemed conclusive.—*Wyrick v. Missouri, K. & T. Ry. Co.*, 74 Mo. App. 406.

**App. 1905.** Where a shipment of hogs arrived at the city of destination at 8 o'clock a. m. on a very warm day, failure of the railroad company to deliver them at the pens until 3 o'clock p. m. was gross negligence, for which the company was liable, notwithstanding a provision in the contract of shipment that, in consideration of a reduced rate, there should be no liability for delay in shipment.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 87 S.W. 9, 112 Mo. App. 610.

A contract by a shipper of live stock exempting a carrier from liability for failure to deliver stock promptly does not cover a negligent delay.—*Id.*

**App. 1905.** Where a written agreement, voluntarily signed by a shipper while on the train with his cattle, contained a clause waiving liability on account of delay in shipping the cattle after the delivery of the same to the agent, no action could be maintained by the shipper for a breach of a verbal promise made by the agent to transport the cattle by the first train.—*Hoover v. St. Louis & S. F. R. Co.*, 88 S.W. 769, 113 Mo. App. 688.

**App. 1906.** A provision in a contract for the shipment of live stock that the carrier should not be liable for damages resulting from suffocation of animals in transit does not apply where the suffocation results from a delay in the shipment due to the negligence of the carrier.—*McFall v. Wabash R. Co.*, 94 S.W. 570, 117 Mo. App. 477.

**App. 1906.** A provision in a contract for the shipment of cattle exempting the carrier from liability on account of delay is enforceable only to the extent of delays not caused by its own negligence.—*Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618.

**App. 1910.** Where a shipper stipulated to release all causes of action for damages by written or verbal contract prior to the written contract of shipment of live stock, the agreement had no effect on an action by the shipper for a breach of the common-law duty to provide cars within a reasonable time after demand.—*Baker v. St. Louis & S. F. R. Co.*, 129 S.W. 436, 145 Mo. App. 189.

**App. 1913.** A stipulation in a bill of lading that the shipper waives all causes of action that may have accrued to him by reason of any representation made to him prior to the execution of the bill of lading, and that all such prior representations are merged in

the contract, does not operate to release a claim arising under a prior independent contract terminated by the parties.—*Vivion v. Chicago & A. Ry. Co.*, 157 S.W. 971, 172 Mo. App. 352.

**App. 1920.** There being no delay in furnishing cars under the contract under which the shipment was made, the language thereof that the shipper waives and releases all claims arising from or connected with the shipment or the arrangements therefor, existing at or before the execution of the contract, including "any delay in the furnishing of cars," relates to prior delay in furnishing them on notice.—*Coleman v. Hines*, 217 S.W. 602.

**App. 1925.** Common-law liability for negligence *held* not superseded, but merely modified, by special contract.—*Morrow v. Wabash Ry. Co.*, 276 S.W. 1030, 220 Mo. App. 518.

**App. 1925.** Carrier had right, under bill of lading, to show that delay to intrastate shipment of live stock was not caused by its negligence.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

#### ←218 (7). Operation and effect of limitation of amount of liability.

**Sup. 1899.** In a shipping contract, the word "horse," in a clause limiting the measure of recovery for "each horse, mule," etc., does not include a "jack."—*Richardson v. Chicago & A. Ry. Co.*, 50 S.W. 782, 149 Mo. 311.

**Sup. 1915.** That rate filed pursuant to Interstate Commerce Act, § 6, where full value of horse was declared, was unreasonable and made in bad faith, *held* not to entitle shipper accepting limited liability contract to recover the full value.—*Donovan v. Wells Fargo & Co.*, 177 S.W. 839, 265 Mo. 291.

**App. 1895.** Where, in a bill of lading limiting the liability of the carrier for each horse or mule to \$100, a jack is shipped and billed as a jack, the limitation does not apply.—*Richardson v. Chicago & A. R. Co.*, 62 Mo. App. 1.

Where a jack was shipped under a bill of lading containing a limitation of liability to \$100 for each horse or mule, the owner, on the killing of the jack by the negligence of the carrier, is not limited to such sum; the term "horse" not including a jack.—*Id.*

**App. 1897.** A contract with a railroad company for the shipment of an animal contained a stipulation that its value did not ex-

ceed \$50, and that the rate of compensation was based on the agreement that, in case the loss or damage resulted from negligence of the railroad company or its servants, the company did not assume a liability for such loss or damage to exceed the said valuation. This stipulation was a part of a printed form filled in by defendant's agent, and signed by him and plaintiff's agent, without inquiry as to the value of the animal. *Held*, that this stipulation was not an agreement by which, in case of loss, the damages became liquidated, but is a general limitation of value, and, in an action against the company for the loss of the animal through defendant's negligence, plaintiff's recovery will not be limited to the amount stipulated.—*Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 68 Mo. App. 255.

**App. 1906.** A carrier's contract for the transportation of certain cattle stated that their "estimated weight was 110,400 and their value \$50 a head"; that in consideration of a reduced freight rate, it was agreed that the carrier should not be liable for loss or injury to any of the animals in any amount in excess of the valuation thereof as stated by the shipper. When weighed and delivered to the purchaser the cattle weighed 113,720 pounds, and brought in gross a few cents over \$50 a head. *Held*, that such provisions did not prevent the shipper from recovering damages from shrinkage and loss of market caused by the carrier's negligent delay of the cattle; the damages claimed being within the limits of the agreement.—*Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211.

**App. 1906.** Where a contract for the shipment of cattle provided that the cattle should be valued at \$50 per head and that in case of loss or injury, the liability of the carrier should be limited to a sum not exceeding such amount per head, and the cattle were sold at destination for a certain amount less than the value of all the cattle at \$50 per head, such difference was not the amount of damages, the provision meaning that for loss or injury to any one or more of the cattle, the damages should not exceed \$50 for each one.—*Lee v. Wabash R. Co.*, 94 S.W. 901, 118 Mo. App. 476.

**App. 1906.** A stipulation, in a contract for the shipment of cattle, limiting liability for damages caused by a delay to the extra expense of feeding will not be enforced, where the delay is caused by defendant's negligence.—*Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

**App. 1906.** Though a contract for the shipment of cattle provides that in consideration of a reduced rate the shipper will accept as full compensation for any loss or damage occasioned by delay the amount expended by him in the purchase of food and water, a shipper is entitled to compensation for actual damages sustained as the direct result of the carrier's negligence, within the sum at which the animals were valued in the contract.—*Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618.

**App. 1906.** A bill of lading stipulated that in consideration of a reduced rate, the shipper agreed that the carrier should not be liable for shrinkage caused by delay exceeding 20 pounds on each animal. There was no evidence that the cattle were shipped at a reduced rate. *Held*, that the recital in the bill of lading was insufficient to limit a recovery on account of shrinkage not to exceed 20 pounds on each animal.—*Farmers' Bank of Laddonia v. Wabash R. Co.*, 95 S.W. 286, 119 Mo. App. 1.

**App. 1907.** Where a contract for the shipment of cattle provided that they were of the agreed valuation of \$50 per head, and that in case of loss or injury defendant's liability should not exceed that amount per head, it only limited the damage or loss on each animal, and, though the shipper should sell the whole number for a sum as large or larger than the total contract value, it would not prevent him from recovering the loss on each animal, or the aggregate loss on the whole, provided it did not exceed the amount limited in the contract.—*Davis v. Wabash Ry. Co.*, 99 S.W. 17, 122 Mo. App. 637.

**App. 1909.** A printed contract of carriage provided that the rate given was based upon a valuation of each horse, mule, etc., at \$100, and, where the value declared by the shipper exceeded the value given, 25 per cent. would be added to the rate for each 100 per cent. additional declared value, and the carrier should not be liable for loss or damage in excess of the declared value, and, while the contract stated that the rate was seven cents per 100 pounds, the shipment was not by weight and no rate of charge was named. The blank for the shipper's valuation was filled in by a dollar sign and the letters "Trf.," and the blank showing the kind of animals was filled in "horses" instead of "mules," which were shipped. *Held*, that the contract was insufficient to limit the carrier's liability to the value stated therein.—*Wilcox v. Chicago Great Western Ry. Co.*, 115 S.W. 1061, 135 Mo. App. 103.

**App. 1915.** Carriers' conversion of a shipment of horses by changing the consignment deprives them of the benefit of the limitation of liability in the contract.—*People's State Savings Bank v. Missouri, K. & T. Ry. Co.*, 178 S.W. 292, 192 Mo. App. 614.

**App. 1910.** A stipulation of limited liability in a contract to transport live stock *held* not enforceable, where the carrier exacted a rate over that allowed by law.—*Kolk-meyer v. Chicago & A. R. Co.*, 182 S.W. 794, 192 Mo. App. 188.

**App. 1916.** Where a bill of lading fixed the recovery for loss of horses at \$100 in consideration of a reduced rate, the owner, though he receipted for the injured animal on representations by the local agent of the carrier that it was liable, cannot recover expenses in attempting to cure the horse.—*Jones v. Louisville & N. R. Co.*, 182 S.W. 1064.

**App. 1916.** Under provision in contract that carrier's liability was limited to valuation declared by shipper of cattle and that the rate charged was based on such valuation, the measure of damages was the amount of actual damages from the carrier's negligence, in no case to exceed the sum stipulated.—*Greening v. Chicago & N. W. Ry. Co.*, 183 S.W. 1121.

**App. 1928.** Shipper of horses, even if governed by written contract with another covering entire car, *held* entitled to have valuation for loss of horse fixed by charges which he paid (*Hepburn Act*, as amended by *Act March 4, 1915*, and *Act Aug. 9, 1916* [49 USCA § 20]).—*Hunter v. American Ry. Express Co.*, 4 S.W.(2d) 847.

☞218(8). Operation and effect of stipulations requiring shipper to load, unload, and care for stock.

**Sup. 1883.** It was agreed, in a contract for the transportation of cattle, that the shipper "is to load and unload said stock at his own risk"; the railroad company "furnishing laborers to assist, who will be subject to the orders of the owner." *Held*, that all risks attendant on loading or unloading were assumed by the shipper, and he could not recover of the company for injuries so occurring.—*Atchison v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. 213.

**App. 1903.** Though a contract of shipment of cattle provided that the shipper should at his own risk feed and water its stock while en route, where the carrier undertook to perform that duty against the protest of plaintiff, it was liable for damages re-

sulting from a negligent performance thereof.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1912.** An agreement of owners of horses to load them onto a car did not preclude a recovery for their escaping from improper pens provided.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 146 S.W. 1181, 163 Mo. App. 251.

**App. 1924.** Contract requiring shipper to feed and water hogs en route is binding on him, and relieves carrier from liability for damages resulting from failure to do so, if opportunity is given him to perform such duty.—*Argenbright v. St. Louis & S. F. Ry. Co.*, 267 S.W. 74, 218 Mo. App. 633.

**App. 1928.** Shipper, whose agent loaded hogs into car, *held* not entitled to damages for death of hogs from overloading, where contract relieved carrier.—*Grisham v. St. Louis-San Francisco R. Co.*, 12 S.W.(2d) 101.

☞218(9). Operation and effect of stipulations requiring examination of cars by shipper.

See explanation, page iii.

☞218(10). Operation and effect of stipulation for notice of claim for damages.

**Sup. 1878.** Recital, in the margin of a contract for the shipment of stock, "Claim for loss and damages must be presented within thirty days from date of shipment in order to receive attention," cannot be construed as depriving the shipper of his right of action in case he fails to present his claim.—*Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

**Sup. 1899.** A shipping contract requiring the owner to notify the carrier of damage within five days after it occurs will not be enforced, where the carrier hauled and injured animal to a point distant from destination, and the owner had no means of learning of the injury within five days.—*Richardson v. Chicago & A. Ry. Co.*, 50 S.W. 782, 149 Mo. 311.

**App. 1885.** A provision of a contract of shipment that the shipper shall give notice of any claim for damages before the stock is removed from the place of destination or from the place of delivery of the same guards against a removal by the shipper or by his authority from the place of destination, and does not apply to a removal by the railroad against the shipper's protest.—*Baker v. Missouri Pac. Ry. Co.*, 19 Mo. App. 321.

**App. 1886.** A stipulation in a contract of shipment that no claim for damage which may occur to the shipment shall be paid, unless a claim for such damage shall be made in writing within five days "from the time said stock is removed from said cars," does not deprive the shipper of the right to sue without giving such notice, where the carrier never delivered the property delivered to it for shipment.—*Wilson v. Wabash, St. L. & P. Ry. Co.*, 23 Mo. App. 50.

**App. 1889.** Plaintiff contracted with a railroad company for the carriage of sheep to C.; the freight stipulated in the contract being \$96. On the arrival of the sheep at C., the conductor refused to permit delivery of the sheep there, claiming that the freight charges were more than \$96, which was tendered. It was finally agreed that the sheep should be forwarded to another place, where plaintiff succeeded in obtaining sufficient money to release the sheep. The contract contained a stipulation that plaintiff, as a condition precedent to his right of recovery, should give notice in writing before the stock was removed from its place of destination. *Held*, in an action for damages to the sheep, owing to the delay, that the stipulation had no application under the circumstances.—*Baker v. Missouri Pac. Ry. Co.*, 34 Mo. App. 98.

**App. 1892.** Where a contract for the shipment of a calf provided that the shipper should, as a condition precedent to his right to damages for an injury to the animal, give notice in writing of his claim before the stock was removed from the point of shipment and before it was mingled with other stock, and within one day after its delivery at the point of destination, a notice given some three months after the injury was sufficient, where the shipper was unable before that time to learn the extent of the injuries, and until that time believed them not to be of a permanent nature.—*Harned v. Missouri Pac. Ry. Co.*, 51 Mo. App. 482.

**App. 1893.** A contract for the shipment of live stock provided that, should loss or damage of any kind occur to the property while it was in possession of the railroad company, the shipper should in five days after such loss or damage give notice in writing to the railroad company. *Held*, that this provision related to injury or damage to the cattle themselves, and did not refer to damage which the shipper might suffer, by reason of the negligent delay during which there was a change

in the market price.—*Leonard v. Chicago & A. Ry. Co.*, 54 Mo. App. 293.

**App. 1895.** Where, after a jack which had been shipped over defendant's road under a bill of lading requiring the shipper, in case of loss or damage, to give notice in writing of his claim therefor within five days after such loss or damage, was injured, it was taken by defendant's employes to a distant place and killed, and plaintiff, as soon as he learned of injury, gave written notice, though more than five days after the injury, such provision will not prevent a recovery.—*Richardson v. Chicago & A. R. Co.*, 62 Mo. App. 1.

**App. 1899.** A provision in a contract for the shipment of live stock to the effect that no claim for damages, which might accrue to the shipper, should be paid by the carrier or sued for by the shipper, unless a claim for the loss should be made in writing within five days from the time the stock was removed from the cars, covers all claims for damages—not only damages to the stock itself, but also damages arising out of delay in transportation of the same, and therefore the shipper, on failing to give notice of his claim within the time fixed, could not maintain an action for damages to the stock arising out of delay in the transportation.—*Hamilton v. Wabash R. Co.*, 80 Mo. App. 597.

**App. 1905.** A provision in a contract for the shipment of hogs that, as a condition precedent to the recovery of damages for any loss or injury, the shipper must give written notice of a claim within a certain time, required notice of a claim arising from the death or shrinkage of the hogs through delay in delivery, and for damages from a fall in the market during such delay.—*Smith v. Chicago, R. I. & P. Ry. Co.*, 87 S.W. 9, 112 Mo. App. 610.

Where a contract for shipment of live stock provided that any claim for damages should be presented to the carrier within one day after delivery of the stock at destination, and before the injured stock was mingled with other stock, the giving of such notice was a prerequisite to a right to recover for injuries to the stock.—*Id.*

**App. 1906.** Where a contract for the shipment of cattle provided that no loss or damage to the same should be allowed, unless a written claim should be made within 10 days after the cattle should have left the car, it meant damage before the cattle left the cars, and did not apply to a claim for loss

of market and expenses consequent upon the delay.—*Wright v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 555, 118 Mo. App. 392.

**App. 1906.** A provision in contract for the shipment of live stock requiring the shipper to give notice to a general officer of the company was an unreasonable restriction, and a notice to the company's general claim agent was sufficient.—*Jones v. Quincy, O. & K. C. R. Co.*, 94 S.W. 735, 117 Mo. App. 523.

**App. 1906.** A shipper of stock wrote the carrier that he had had "a very heavy shrink," and stated that in one instance all the cattle in one car were knocked down by rough handling, and complaint was made of the delay in transportation, which caused the stock to reach destination too late for a certain market. *Held*, that the letter did not amount to a claim for damages merely from loss of weight alone, and did not preclude recovery for loss due to depreciation on account of loss in weight, injury to quality, and decline in the market.—*Itatiff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644.

**App. 1908.** A shipper's contract, providing that no claim for damages which may accrue to the shipper "under the contract" shall be allowed, unless a claim for such loss or damage be made in writing, verified by affidavit, and delivered to the general freight agent within 10 days from the time the stock is removed from the cars, requires the shipper to give the notice, though the injury complained of was suffered by a horse after it had left the car, since the injury was one "under the contract."—*Letts v. Wabash R. Co.*, 111 S.W. 138, 131 Mo. App. 270.

Where a shipper's contract provided that notice of injury to stock shipped should be given the general freight agent at L., a notice directed to the general claim agent at L. was insufficient.—*Id.*

Though it is a rule that, where a shipper's contract provides for notice of injury to stock in a stated time, no notice need be given where the shipper could not know the extent of his damage within that time, still the rule requires the giving of notice in a reasonable time.—*Id.*

**App. 1908.** A contract of shipment of horses required written notice of injury within five days after the horses had been unloaded, but failed to designate the agent to whom notice should be given, and provided that, if consigned to any stockyards or other live stock market, then notice should be given be-

fore the stock was removed from the yards to the live stock agent or the general freight agent, or to the freight agent nearest the yards or market place. Within five days after unloading the horses not shipped to any stockyards or other live stock market, the shipper wrote to an agent of the carrier, as general freight agent, informing him of injury to a horse, and directed the letter to the carrier's ticket and freight office. Shortly thereafter the shipper applied to the carrier's division freight agent at the station where shipper lived, and received from him directions as to his claim, and at his request handed to that agent the papers relative thereto. Thereafter the division freight agent was transferred, and, in reply to a letter from the shipper's attorney, stated that he would refer his letter to the then district freight agent, who shortly thereafter called on the shipper relative to the claim. *Held*, that there was a sufficient compliance with the contract as to the giving of notice.—*Hancock v. Chicago & A. Ry. Co.*, 111 S.W. 519, 131 Mo. App. 401.

**App. 1908.** Where notice of injury to plaintiff's cattle was mailed in time to have reached defendant's claim agent within the time limited by the transportation contract in the ordinary course of mail, there was a reasonable compliance with the contract provision to give notice within 10 days of the time the cattle were unloaded.—*Vencill v. Quincy, O. & K. C. R. Co.*, 112 S.W. 1030, 132 Mo. App. 722.

**App. 1909.** A stipulation, in a contract for the carriage of hogs, requiring the shipper, as a condition precedent to a claim for loss or damage to the hogs, to notify the carrier thereof in writing within a specified time refers solely to loss or damage to the animals themselves, and not to damages for extra feed and loss of market resulting from delay in transportation.—*Aull v. Missouri Pac. Ry. Co.*, 116 S.W. 1122, 136 Mo. App. 291.

**App. 1909.** Where a shipper of cattle, in consideration of a reduced freight rate, has consented that it shall be a condition precedent to recovery for delay that he shall give written notice of his claim within one day after arrival, and fails to give notice of any kind for two or three weeks after arrival, and fails to show any excuse therefor or any waiver of the condition, he cannot recover.—*Schonhoff v. St. Louis & S. F. Ry. Co.*, 117 S.W. 113, 135 Mo. App. 705; *Harris v. Same*, 117 S.W. 113.



**App. 1909.** A contract for transporting live stock, which requires notice of loss or injury to the stock, only requires notice touching loss or injury to the stock, and does not require notice of loss resulting from the decline in the market price of cattle suffered because of the delay of the carrier in transit.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S. W. 659, 137 Mo. App. 276.

A shipper who sues in tort makes out his case by showing that the carrier received the stock in good condition, that it negligently delayed transportation thereof, and by proving negligent injury to the stock and decline in the market, though the stock was shipped under a contract requiring notice of loss within a specified time.—*Id.*

That the action against a carrier of stock sounds in tort does not avoid the effect of the special contract of carriage, if properly pleaded.—*Id.*

**App. 1910.** A contract for the shipment of cattle required the shipper to give notice of any claim for injury before the cattle were removed from the place of destination and mingled with other cattle. The shipper placed the cattle in a pasture after their arrival at their destination and kept them separate from other cattle and open to inspection by the carrier. *Held*, that the failure of the shipper to give notice of his claim for injury until more than three weeks after the cattle reached their destination did not defeat a recovery, as the carrier, under the notice given, had opportunity to make the investigation the contract designed to afford.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App. 1910.** Where a contract to ship mules provided for notice of loss to be given before leaving point of shipment or within one day after arriving at destination, it was not necessary to give notice of loss, where there was none before leaving the point of shipment, and the stock never reached the place of destination, and the carrier took possession of the stock and sold a part of it, and also negotiated for a settlement.—*Harrington v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 807, 143 Mo. App. 418.

**App. 1910.** Where the injury to a horse during transportation was such that it could not be immediately discovered or its extent ascertained on the horse's arrival at its destination, the failure to give prompt written notice of the claim for damages before the horse was removed from the point of ship-

ment as required by the contract of shipment was no defense to an action therefor.—*Burns v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 1, 151 Mo. App. 573.

**App. 1911.** Where a shipper of horses did not give notice of his loss within one day after their arrival at their destination, as required by the contract of shipment, because the extent of the loss was not manifest until several days thereafter, and he could not know on their arrival that one of them would develop a fatal case of pneumonia, the stipulation requiring notice was no defense to an action on the contract.—*McKinstry v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 1061, 153 Mo. App. 546.

**App. 1914.** A stipulation in a contract for an interstate shipment of live stock as to notice *held* not to apply to a loss from decline in market caused by delay in transportation.—*Riddler v. Missouri Pac. Ry. Co.*, 171 S.W. 632, 184 Mo. App. 709.

**App. 1914.** Failure to observe provisions in a contract for the shipment of a car load of mules as to times within which to give written notice of damages, file a written notice of claim, and bring action *held* to prevent recovery of damages.—*Bowman v. Missouri, K. & T. Ry. Co.*, 171 S.W. 642, 185 Mo. App. 25.

**App. 1915.** Verbal claim for damages by shipper of mules against railroad *held* a compliance with the contract that plaintiff should present any claim within 10 days.—*Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.*, 180 S.W. 412.

**App. 1916.** That notice of claim for delay of a cattle shipment was sent to the building of another railroad company which was a part of defendant's system *held* no ground for objection, where defendant's claim agent replied.—*Rissler v. Missouri Pac. Ry. Co.*, 183 S.W. 676.

**App. 1916.** Consignee's written receipt for the delivery of live stock is not the written notice of claim for damages required under the bill of lading.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282.

A failure to give written notice of claim for damages to the carrier, within a certain time after live stock was delivered, bars the shipper's right of action.—*Id.*

A written notice of claim for damages to the carrier within a certain time after live stock is delivered is not given by bad-order notations on the freight bill.—*Id.*

Where bill of lading requires written notice of claim for damages to the carrier within a certain time after live stock is delivered, oral notice to a station agent is ineffectual.—*Id.*

A written notice of claim for damages to the carrier within a certain time after live stock is delivered, as required by the bill of lading, is not rendered unnecessary because a station agent at destination knows of the injury to the stock.—*Id.*

**App. 1917.** Live stock bill of lading provisions, requiring reasonable notice of loss, are enforceable.—*Moler v. Louisville & N. R. Co.*, 195 S.W. 524.

**App. 1920.** In an action against a carrier for injuries to a jack shipped, where it appeared that when the jack was removed from the car at destination it limped, and plaintiff called such fact to the attention of defendant's agent, who placed the jack in plaintiff's control and suggested that a named veterinary be sent for, such facts constituted actual notice of the injuries to defendant and a consent that plaintiff receive and care for the animal.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App. 1920.** The provisions of Interstate Commerce Act, § 20, as amended (49 USCA § 20), that no notice of claim or filing of claim shall be required where loss, damage, or injury is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, had no application where plaintiff predicated liability solely on defendant's failure to safely transport live stock without asserting carelessness or negligence.—*Cunningham v. Missouri Pac. R. Co.*, 219 S.W. 1003.

**App. 1924.** Provision of contract requiring shipper to give carrier notice of injury to animals before they were removed from carrier's possession *held* inoperative, where carrier was first to discover injury, and prematurely ended shipment, and unloaded the animals on refusal of connecting carrier to accept.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

**App. 1924.** Under a bill of lading requiring shipper of live stock to give notice to carrier before removal of live stock from its possession, of any visible or manifest injury to the live stock, shipper *held* not obliged to give such notice, where injury arose from shrinkage, loss of weight, and debilitated condition of the cattle produced by negligent de-

lay and confinement, in view of Amendment of March 4, 1915, to the Interstate Commerce Act (49 USCA § 20).—*Sandker v. Wabash Ry. Co.*, 287 S.W. 957; *Phillippi v. Same*, 267 S.W. 930.

**App. 1928.** Filing action for damages to horses and mules within six months of accrual of damages *held* sufficient written notice under shipping contract.—*Morrow v. Wabash Ry. Co.*, 6 S.W.(2d) 628.

#### ☞ 218 (11). Waiver.

Discrimination as to waiver provisions, see ante, ☞ 32(2).

**Sup. 1876.** Plaintiff shipped cattle over a railroad under a stipulation that no claim for loss or damage should be allowed "unless the same is made in writing before or at the time the stock is unloaded." The cattle were injured in a wreck, and 17 hours thereafter the train reached the railroad's stockyards, near midnight, in the rain, where the stock was unloaded; plaintiff assisting the trainmen. Before the unloading began plaintiff verbally notified the yardmaster that he would not receive the stock, except under protest, and asserted his claim for damages at that time, without objection being made to the form of it. The yardmaster told plaintiff that it was unnecessary for him to go to the company's office that night. On the next day, with the yardmaster's consent, plaintiff drove the cattle to his farm, 16 miles away, and three days later he made written claim for damages, which the railroad declined to pay. *Held*, that the railroad waived the time in which the written notice was to be given.—*Rice v. Kansas Pac. Ry.*, 63 Mo. 314.

**App. 1885.** A shipper is excused from complying with a provision of the contract of shipment that written notice of a claim for damages shall be given before the stock is removed from the place of destination or place of delivery of the same, where the railroad by its own willful act refused to deliver the stock at the point of delivery and destination, but, on the contrary, sent it on another line, against the shipper's protest, to a station 100 miles distant from any office of defendant.—*Baker v. Missouri Pac. Ry. Co.*, 19 Mo. App. 321.

**App. 1895.** Where, after a jack shipped over defendant's road was injured, it was taken to a distant point and killed by defendant's employes, plaintiff was not required to give the notice provided for in the bill of lading, reciting that, in case of loss or damage, writ-

ten notice of the claim therefor must be given within five days after such loss or damage; defendant's conduct making such notice unnecessary.—*Richardson v. Chicago & A. R. Co.*, 62 Mo. App. 1.

**App. 1899.** In an action by a shipper of live stock against a carrier to recover damages for delay in transporting the stock, it appeared that the contract of shipment stipulated that no claim for damages which might accrue to the shipper should be allowed or sued for by the shipper, unless a claim for the damages should be made in writing within five days from the time the stock was removed from the cars. The carrier denied all liability. *Held*, that letters written by the carrier in reference to the shipper's claim for delay in the transportation of stock, in which the carrier denied liability on the ground that it did not obligate itself to make any particular time and that the delay was unavoidable, did not tend to prove a waiver of the provision in the contract; the letters having been written after the expiration of the period fixed in the contract.—*Hamilton v. Wabash R. Co.*, 80 Mo. App. 597.

**App. 1903.** Notice of injury to stock, required by a contract of shipment to be given by the shipper as a condition precedent to his right to damages for such injury, was waived by the carrier, where it, on receiving a partial and incomplete notice, refused to investigate the shipper's claim and denied liability.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1904.** Where a railroad company's general freight agent makes no objection to a claim for delay in transporting stock on the ground that it is not verified as required by the contract of shipment, but enters into negotiations for a settlement with the shipper, such conduct is evidence of a waiver of verification, sustaining the finding thereof by the jury.—*Summers v. Wabash R. Co.*, 79 S.W. 481, 114 Mo. App. 452.

**App. 1906.** Where a carrier's general freight agent made no objection to a claim for a delay in the transportation of live stock, because of a lack of verification, or because it was not filed in time, but denied liability because the delay occurred on the line of a connecting carrier, plaintiff's alleged failure to file the claim within the time required by the bill of lading was waived.—*Ingwersen v. St. Louis & H. Ry. Co.*, 92 S.W. 357, 116 Mo. App. 139.

**App. 1906.** Where a contract for the shipment of live stock provided that the shipper should not recover for loss of or injury to the live stock unless he gave written notice of the damage claimed within 10 days from the date of delivery by the carrier, this provision does not prevent the recovery where correspondence of the carrier showed that it received notice of the claim for damages and rejected it on other grounds, making no objection as to notice.—*McFall v. Wabash R. Co.*, 94 S.W. 570, 117 Mo. App. 477.

**App. 1906.** Where a carrier of live stock learned of an alleged loss, and proceeded to investigate it through its general claim agent, a provision of the contract for transportation for a notice of any claim for a loss is waived.—*Jones v. Quincy, O. & K. C. R. Co.*, 94 S.W. 735, 117 Mo. App. 523.

**App. 1906.** Where a contract of shipment required a verified claim for any damage to be made within a specified time, and the carrier retained an unverified claim without objection during the period fixed for its presentation, and investigated the merits of the claim, any objection to the sufficiency of the claim was waived.—*Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618.

**App. 1906.** Where a contract of shipment requires any claim for damages to be made within a certain time from the unloading of the stock, the receipt of a claim by the carrier within the required period and its consideration on the merits without objection to its sufficiency amounts to an acceptance by the carrier of the claim as a full performance of the condition.—*Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644.

**App. 1906.** A bill of lading bound the shipper to give notice of a claim for damages verified by affidavit. At the request of the owner of a shipment of cattle, a third person made out a detailed statement of the loss and inclosed it in a letter to the carrier's claim agent. The statement was not sworn to. The letter informed the agent that the claim was made in behalf of the owner and at his request. The agent retained the statement without objection, and acted on it. *Held*, that the carrier was estopped from objecting to the sufficiency of the notice.—*Farmers' Bank of Laddonia v. Wabash R. Co.*, 95 S.W. 286, 119 Mo. App. 1.

**App. 1908.** Where, after injury to a horse while being unloaded from a car, no

notice of its injury is given as required by the shipper's contract, the fact that three months thereafter an employé of the carrier, who was not shown to have any authority to adjust the matter, wrote a letter to the shipper relative to an adjustment, was not a waiver of the required notice.—*Letts v. Wabash R. Co.*, 111 S.W. 138, 131 Mo. App. 270.

**App. 1908.** Notice of injury to cattle, having been mailed in time to reach defendant's claim agent within the time limited by the contract, was not delivered until two days beyond the time so fixed. Defendant's general freight agent acknowledged receipt of the notice, did not mention that it had been received too late, but asked for further information, promising to endeavor to arrange an equitable settlement without delay. *Held* to indicate an intention to waive notice entertained prior to the expiration of the period prescribed therefor.—*Vencill v. Quincy, O. & K. C. R. Co.*, 112 S.W. 1030, 132 Mo. App. 722.

**App. 1909.** Where a verbal notice of a shipper's claim for injury to live stock was given to the carrier's claim agent at destination on the day of arrival, and the agent refused to investigate the claim and instructed the person giving the notice to sell the stock and put in a claim for damages, delivery of written notice of claim on the first day after arrival as required by the bill of lading was waived.—*Clubb v. St. Louis & S. F. R. Co.*, 117 S.W. 110, 136 Mo. App. 1.

A carrier inducing a shipper of live stock to believe strict compliance with a stipulation in the bill of lading for notice of the claim as a condition precedent to recovery of damages to the shipment will be waived cannot escape liability because of the shipper's omission to comply strictly with the requirement.—*Id.*

**App. 1914.** Provisions in an interstate cattle shipping contract for immediate notice of loss and for suit, if any, within six months, *held* for the benefit of the carrier and might be waived, and were waived by the carrier accepting a belated notice and holding the same for investigation until after the six months' limitation had expired.—*Sims v. Missouri Pac. Ry. Co.*, 103 S.W. 275, 177 Mo. App. 18.

**App. 1914.** Correspondence between a carrier of live stock and the shipper *held* not to have waived notice of the shipper's claim for loss for shrinkage by delay in transporta-

tion.—*Riddler v. Missouri Pac. Ry. Co.*, 171 S.W. 632, 184 Mo. App. 709.

A stipulation *held* not to show a waiver of notice of the shipper's claim for loss from shrinkage.—*Id.*

**App. 1915.** Judgment for a shipper of mules for injuries, rendered on the theory that the station agent had waived the requirement of the contract of shipment that the railroad be notified in writing within one day, could not stand, in view of the provision that no agent of the road had authority to waive its provisions.—*McElvain v. St. Louis & S. F. R. Co.*, 180 S.W. 1018.

Plaintiff, shipper of mules, whose contract with the road required written notice of injuries and provided that no agent might waive its provisions, complied therewith when, upon oral complaint to the station agent, the latter noted the condition of the stock and within a day reported to the company in writing.—*Id.*

Railroad's sending a traveling agent to inspect mules injured in transit, and its failure to disaffirm, *held* evidence from which a ratification of the station agent's unauthorized act, in telling plaintiff shipper he need not serve a written notice of injury because he himself would notify the company, could be inferred.—*Id.*

**App. 1916.** Railroad, by treating claim of shipper of hogs for shrinkage as filed in time and being formally sufficient, denying liability on the merits, waived formal compliance with provision of contract of shipment requiring written notice of claims for damages within ten days.—*Hull v. Chicago Great Western R. Co.*, 185 S.W. 1155, 193 Mo. App. 425.

In case involving interstate shipment of live stock, state court will apply federal rule relative to waiver of compliance with provision of contract of shipment calling for written notice of claims for damages.—*Id.*

**App. 1916.** Bill of lading provision requiring notice of claim within certain time after delivery of live stock cannot be waived.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S.W. 282. See Carriers, 6-32(2) in this Digest.

**App. 1917.** Provision of written contract for interstate shipment of live stock that shipper should give notice of any claim of damage to carrier's agent at destination or before stock is mingled with other stock cannot

be waived by carrier.—*O'Briant v. Pryor*, 19 S.W. 759.

That carrier's agent knew of bad condition of live stock on arrival, and made "bad order" report to carrier, did not dispense with notice of claim which shipper under contract of interstate shipment was required to give.—*Id.*

**App. 1918.** Interstate carrier could not lose right to rely on provision of contract limiting time for suit by waiver or estoppel, whether acts relied on occurred before or after the expiration of the specified time in view of the commerce act.—*Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co.*, 200 S.W. 109.

By correspondence between shipper's attorney and carrier's agent, carrier held not to have waived or lost by estoppel the right to rely on provision of shipping contract limiting time for suing.—*Id.*

**App. 1920.** Where, in an action for injuries to a jack shipped, plaintiff called the attention of defendant's agent to the condition of the animal when unloaded at destination, and such agent suggested that a named veterinary be called, a written notice of injuries was waived.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App. 1920.** The giving of notice in writing of loss or injury to an interstate shipment of live stock and the filing of notice that claim would be made and of the itemized claim as required by the bill of lading were not dispensed with by the railroad's agent's knowledge of the loss or injury.—*Cunningham v. Missouri Pac. R. Co.*, 219 S.W. 1003.

#### 219. Connecting carriers.

Questions for jury, see post, 230.

##### 219 (1). In general.

**Sup. 1881.** In the absence of special contract or knowledge of peculiar facts, a connecting carrier is guilty of no wrong in unloading cattle delivered to it by the initial carrier and transferring them to its own cars.—*McAllister v. Chicago, R. I. & P. R. Co.*, 74 Mo. 351.

**App. 1880.** Where plaintiff was familiar with usages of defendant's business, and had shipped cattle over defendant's road for five years, and knew that defendant's road ran from East St. Louis to Indianapolis, connecting there with another road, which in turn connected at Pittsburg with still another, and

knew that the cars of defendant never ran through on other lines unless there was a special agreement with the shipper to that effect, the mere giving of a through rate by defendant on certain cattle from East St. Louis to Philadelphia was not sufficient to show a contract to carry beyond Indianapolis.—*McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

**App. 1893.** If a carrier was guilty of a breach of contract for through shipment by failing to carry the stock beyond the terminus of its line, the shipper was not precluded from recovering the natural and proximate damages occasioned to him by such breach, because he thereafter entered into another contract with another carrier for the transportation of the stock to the point of their original destination.—*Handley v. Chicago, R. I. & P. Ry. Co.*, 55 Mo. App. 499.

**App. 1900.** Plaintiff shipped horses over the line of a carrier, which were to be given to a connecting carrier at a point on the first carrier's line, and taken by such connecting carrier through to their destination. Plaintiff paid the first carrier for their transportation the entire distance, but the second carrier was not aware that its charges had been paid, and refused to deliver the horses to plaintiff without the payment of its charges. Held that, as plaintiff did not accompany his demand for the horses with a production of his contract with the first carrier, or other evidence of payment, his assertion that he had paid the entire carriage was not conclusive on defendant, and its refusal to deliver was not in itself a conversion.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

**App. 1901.** In an action by a shipper of live stock, to recover for the nondelivery of a part of his shipment, it appeared by the statement of facts that a third party was the owner of a certain number of cattle, which he intended to ship to Kansas City to be sold by plaintiff for him; that he delivered a part of said cattle for shipment to the Soo road, and that defendant, Milwaukee road, entered into a contract with such third party, relating to the shipment of said cattle over their road, and also issued to him two bills of lading; that said third party, on receiving said bills of lading, drew a draft in favor of the bank, with the bills of lading attached, which was forwarded to Kansas City and paid by plaintiff; that the third party accompanied the shipment, and that the agreement set forth in the contracts between defendant and said third party was to the effect that defendant

was to transport the cattle to a certain station at a specified charge. It further appeared that, when the cattle arrived at the junction of the Soo road and defendant road, the cars were switched to the track of defendant, said third party still accompanying the cattle as the person in charge; that defendant would not accept the cattle until said third party had entered into a contract with it in respect to the shipment of the cattle (herein contained; that the cars were then placed in one of defendant's Kansas City trains, said third party accompanying the same as the person in charge; that when the train reached a certain station on defendant's road said third party requested to have the cattle unloaded for rest, water and feed, which was permitted, and the cattle were unloaded into cattle pens maintained by defendant; that said third party, after the cattle had been unloaded, instead of keeping them in defendant's pens, removed them to an adjoining pasture without the knowledge of defendant, and sold a part of the cattle and re-shipped the remainder, which were all of the cattle that reached Kansas City. It did not appear that the Soo road, at the time it placed the cars containing the cattle on defendant's track, or at any time, had any dealings with defendant as to the shipment, or that said Soo road advised defendant of the existence of a contract or bills of lading issued by the third party to it. *Held*, that defendant, when it found the car standing on its track with said third party in charge, had a right to enter into a separate and independent contract with such party for the further transportation of the cars, and to receive the same as if it was the first carrier to which such cattle had been offered for transportation, without reference to any transaction which had taken place between the Soo road and such third party.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

Defendant was not a connecting carrier.—*Id.*

**App. 1911.** In accordance with its usual course of business, the carrier accepted a shipment of cattle and issued a bill of lading through to the destination. The carrier's line ran only to an intermediate point, whence the cattle would be carried over a different line. A single freight charge was made for the shipment. *Held*, that this was a contract for a through shipment, and not merely for the transportation of the cattle to the end of the carrier's line and delivery there to an-

other carrier.—*Miller v. Missouri, K. & T. Ry. Co.*, 138 S.W. 902, 157 Mo. App. 638; *Steckdaub v. Same*, 138 S.W. 904.

**App. 1918.** Where a railroad company furnished the cars for an interstate shipment of stock and by its agent signed the bill of lading, it is deemed the initial carrier, even though the cars after being loaded were transported by a belt line to the track of such railroad company.—*Utz v. Chicago, B. & Q. Ry. Co.*, 208 S.W. 640.

#### 219 (2). Delivery to succeeding carrier.

**App. 1893.** If a carrier, after making a through contract of shipment, placed the special car containing plaintiff's stock in the possession of a connecting carrier, plaintiff's accepting the contract tendered to him by the connecting carrier, after his stock had been received by and was in possession of that company, was not an abandonment, under the circumstances, by the shipper of his rights under the prior contract.—*Handley v. Chicago, R. I. & P. Ry. Co.*, 55 Mo. App. 499.

**App. 1903.** Where the agents of a connecting carrier refuse to accept cattle tendered by the initial carrier, because unaccompanied by a regular waybill, as required by a rule of their company, responsibility for their refusal is on the initial carrier, even though it furnished information sufficient to have enabled the connecting carrier to receive and properly bill the cattle.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1919.** Acceptance of a stallion for shipment by defendant railroad sued for failure to transport expeditiously after acceptance did not arise merely from the fact that another connecting railroad set the shipper's car on the transfer track connecting the two roads, where it was snowing at the time so as to tie up traffic.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S.W. 404.

#### 219 (3). Food, water, and rest.

**App. 1920.** An initial carrier of interstate shipment of sheep is liable under the Carmack Amendment (49 USCA § 20) for failure of the connecting carrier to properly feed and water at intermediate point, though, by reason of stockyards' embargo at destination, shipment could not be unloaded at destination, and for that reason was held at intermediate point.—*Miller v. Quincy, O. & B. C. R. Co.*, 225 S.W. 116, 205 Mo. App. 463.

219 (4). Delay in transportation or delivery.

**App. 1908.** Where plaintiff's cattle were consigned to a commission firm to receive the cattle from the chutes at the stockyards, the carrier was liable for a delay of 1½ hours while the stockyards company transported the cattle as a connecting carrier from the original carrier's terminal station to the cattle chutes.—*Vencill v. Quincy, O. & K. C. R. Co.*, 112 S.W. 1030, 132 Mo. App. 722.

**App. 1910.** Where an initial carrier and a connecting carrier made an arrangement for transportation of live stock at a through rate, a part of which went to a terminal carrier with whom the connecting carrier had an agreement for sending its freight by the terminal carrier on payment of a fixed compensation, the terminal carrier was, in the absence of any showing to the contrary, the agent of the connecting carrier, so that the connecting carrier was liable for any delay of the terminal carrier in transporting cattle.—*Wilburn v. Wabash R. Co.*, 129 S.W. 484, 148 Mo. App. 692.

Where an initial carrier and a connecting carrier had an arrangement for the transportation of live stock at a through rate, the connecting carrier, guilty of delay in transporting cattle, was liable for the damages sustained.—*Id.*

**App. 1920.** Where connecting carrier refused to deliver interstate shipment of sheep from Missouri at Chicago, because the stockyards there had issued an embargo against Missouri sheep on account of rumor of foot and mouth disease, which embargo was not a legal quarantine in sense of being ordered by the government, initial carrier was technically liable for the delay.—*Miller v. Quincy, O. & K. C. R. Co.*, 225 S.W. 116, 205 Mo. App. 463.

Where connecting carrier, on strength of an embargo issued by the Chicago stockyards, held an interstate shipment within the embargo at an intermediate point and there unloaded them, no substantial damages could be recovered against the initial carrier for refusal to go on to Chicago, whereby the cattle decreased in weight by the delay; the evidence showing that there were no facilities for unloading at any other place than the stockyards, and that the embargo forbade even unloading at stockyards.—*Id.*

An initial carrier of interstate shipment is liable under the Carmack Amendment (49 USCA § 20) for delay in transit on other line

of connecting carrier to a different destination, consented to by shipper on refusal of connecting carrier to proceed to original destination because of a nonlegal embargo issued by the stockyards at destination.—*Id.*

219 (5). Loss or injury.

**App. 1901.** Defendant was not liable to plaintiff for a loss of the cattle sold by said third party.—*Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330.

**App. 1908.** Where a carrier received animals and issued a bill of lading therefor to a point beyond its own line, and the bill of lading contained no provision limiting the shipment to its own line, it agreed to carry to such point, and hence was liable for any negligence of its connecting carriers under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any injury to the property caused by the negligence of any other carrier over whose lines it may pass.—*Holland v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 61, 133 Mo. App. 694.

**App. 1911.** Where defendants, connecting carriers, contracted to ship certain mules over their connecting roads from the point of shipment to destination for an agreed price, which they divided according to an agreement between themselves, there was a joint undertaking, and they were jointly liable for injuries sustained to one of the mules because of the furnishing of a defective car.—*Green v. Chicago, M. & St. P. Ry. Co.*, 137 S.W. 611, 156 Mo. App. 259.

**App. 1911.** Under Rev. St. 1909, § 5446, providing that when a carrier receives property to be transported from one place to another within or without the state, and issues receipts or bills of lading, it shall be liable for the negligence of any connecting carrier, the receipt of cattle to be transported beyond its own line renders the carrier liable for the negligence of the connecting carrier, in the absence of a stipulation in the bill of lading to the contrary.—*Miller v. Missouri, K. & T. Ry. Co.*, 138 S.W. 902, 157 Mo. App. 638; *Steckdaub v. Same*, 138 S.W. 904.

**App. 1911.** Plaintiff bank furnished N. money with which to buy horses in Kansas, to be transported and sold in South Carolina, on security of a bill of lading issued by defendant M. company, reciting that the same was consigned by M. to himself, or "shipper's order," at destination. This bill was negotia-

ble and was immediately transferred to plaintiff, and the horses transported to the end of the M. company's line, where they were tendered to defendant L. company, the connecting carrier, which refused to accept them under the "shipper's order" bill, whereupon the horses were unloaded and negotiations had between the L. company's agent and the agent of the M. company and plaintiff's president for a release of the order clause; but plaintiff having refused negotiations were continued with the caretaker in charge of the horses, who surrendered the live stock contract in his possession, and contracted in the name of N. for the further transportation of the horses to destination, without the shipper's order clause, naming a bank at destination as consignee. On arrival the horses were delivered to N., who sold some of them and refused the balance, which were sold by the railroad company, and the draft sent by plaintiff to the bank at destination with the bill of lading for collection remaining unpaid. *Held* that, since the caretaker had no authority to change the contract, and both railroad companies had notice of that fact, their act in so doing constituted a joint conversion of the horses, rendering them liable as insurers for the subsequent loss.—*People's State Savings Bank v. Missouri K. & T. Ry. Co.*, 138 S.W. 915, 158 Mo. App. 519.

**App. 1916.** Where an initial carrier issued a through bill of lading for an interstate shipment over more than one railroad proof that the animals were injured in transit, without proof of where the injury occurred, will support judgment against it.—*Jones v. Louisville & N. R. Co.*, 182 S.W. 1064.

**App. 1918.** Under the Carmack Amendment a connecting carrier, in case of an interstate shipment of stock, is not liable for an injury resulting from the negligence of the initial carrier.—*Utz v. Chicago, B. & Q. Ry. Co.*, 208 S.W. 640.

#### ☞219 (6). Power to limit liability.

**Sup. 1895.** As Rev. St. 1889, § 944, provides that, whenever any property is received by a carrier for transportation from one place to another, such carrier shall be liable for the negligence of any other carrier to which such property may be delivered, a carrier contracting to transport cattle to a point beyond the terminus of its line cannot, by contract, exempt itself from liability for the negligence of the carrier completing the transportation.—*McCann v. Eddy*, 33 S.W. 71, 133 Mo. 59, 35 L. R. A. 110, judgment affirmed (1899) 19 S. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093.

#### ☞219 (7). Validity of contract limiting liability.

**App. 1916.** In a suit against an initial carrier for damages by delay in transit, provisions in a bill of lading requiring written notice of claims *held* valid.—*Thompson v. Atchison, T. & S. F. R. Co.*, 185 S.W. 1145.

In a suit against an initial carrier for damages by delay in transit, provision in a bill of lading requiring that suit for damages be commenced within six months *held* valid.—*Id.*

**App. 1917.** Provision of interstate shipment contract limiting the carrier's liability to \$100 per animal *held* valid under Carmack Amendment to the Hepburn Act (49 USCA § 20).—*Jordan v. Chicago, B. & Q. R. Co.*, 196 S.W. 417, transferred from Supreme Court (1916) 191 S.W. 70, 269 Mo. 281.

A provision of an interstate shipment contract that neither the initial carrier nor any connecting carrier should be liable for any damage to the animals shipped, unless claim be made within ten days from the time the animals were removed, to the carrier on whose line the damage occurred, was valid.—*Id.*

#### ☞219 (8). Operation and effect of limitation.

**App. 1905.** Where an initial carrier failed to furnish a safe and sufficient car for the transportation of hogs, by reason of which the hogs escaped, such carrier was liable, though the hogs escaped beyond the terminus of its line, to which its liability was limited by the shipping contract.—*Jones v. St. Louis & S. F. R. Co.*, 91 S.W. 158, 115 Mo. App. 232.

**App. 1906.** By the first clause of a bill of lading, defendant, the initial carrier, agreed to transport certain cattle from shipping point to destination. The second clause declared that, if the destination was on defendant's road, defendant would deliver the cattle to the consignee at that point, but, if the destination was beyond defendant's line, it would deliver the property to the next connecting carrier, and another paragraph limited defendant's liability for loss or damage to such as occurred on its own line, and declared that its duty should cease on delivering the stock to the connecting carrier. *Held*, that the bill of lading was a through contract of carriage, and that defendant was liable for delay occurring through the negligence of a connecting carrier.—*Ingwersen v. St. Louis & H. Ry. Co.*, 92 S.W. 357, 116 Mo. App. 139.



**App. 1906.** Rev. St. 1899, § 5222, makes a carrier issuing a bill of lading for a through shipment liable for any loss to the shipment caused by its negligence or the negligence of any other carrier. A bill of lading bound the initial carrier to transport cattle to the point of destination, and stipulated that it should be liable only for damages occurring on its own line, and that it should not be responsible for the delivery of the cattle within any specified time nor for any particular market. *Held*, that the carrier was liable for delay occurring through the negligence of a connecting carrier.—*Farmers' Bank of Laddonia v. Wabash R. Co.*, 95 S.W. 286, 119 Mo. App. 1.

**App. 1907.** Rev. St. 1899, § 5222, renders an initial carrier liable for the negligence of a connecting carrier in the case of a contract for a through shipment. A contract for the through shipment of cattle over several lines provided that the initial carrier's liability would be limited to injuries on its own line, and provided that no claim for damages should be allowed unless a written claim should be made within 10 days from the removal of the stock from the cars, and that in case of damage on a connecting line such carrier should not be liable unless such claim should be made to it. *Held* that, where cattle were injured on a connecting line, it was no defense to an action against the initial carrier that no notice had been given to it, and that no notice had been given to the connecting carrier, as defendant could not claim the protection of a provision made for the benefit of another, and the contract did not require notice to defendant except where the injury occurred on its line.—*Davis v. Wabash Ry. Co.*, 99 S.W. 17, 122 Mo. App. 637.

**App. 1908.** A bill of lading for shipment of live stock provided that no carrier should be liable for loss or damage to freight shipped unless it were proved to have occurred during transit over the particular carrier's line, and of this notice should be given, etc. It was also provided that for loss or damage to freight during transit the legal remedy should be against only the particular carrier in whose custody the freight was when lost or damaged. *Held*, that it was not contemplated that in case of a loss on the lines of a connecting carrier notice should be given to the initial carrier; it having stipulated that it was not to be liable for such a loss.—*Holland v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 61, 133 Mo. App. 694.

**App. 1916.** Since the prohibitions of the Interstate Commerce Act forbid the waiver of

defenses open to a carrier, defendant's action in receiving notice of a claim after the time provided in the bill of lading *held* not to waive the provisions of the bill of lading.—*Thompson v. Atchison, T. & S. F. R. Co.*, 185 S.W. 1145.

**App. 1917.** An interstate shipment contract *held* to require notice of damages to the initial carrier only when that carrier was sought to be held and the negligence occurred on its line.—*Jordan v. Chicago, B. & Q. R. Co.*, 196 S.W. 417, transferred from Supreme Court (1916) 191 S.W. 70, 269 Mo. 281.

**App. 1920.** Where a contract for an interstate shipment of live stock provided that the initial carrier should not be liable for loss or damage after delivery to connecting carrier, the initial carrier, which was liable under the Interstate Commerce Act for injuries to the animals while in the hands of connecting carrier, is not entitled to notice thereof, the contract requiring notice of injury occurring on the line of the initial carrier to be given to it as a condition precedent to liability, and making the same requirement in case of injury to the shipment while in the hands of connecting carrier.—*Jordan v. Chicago, B. & Q. R. Co.*, 226 S.W. 1023, 206 Mo. App. 56.

## 220. Actions against carriers of live stock.

Actions for penalties for violation of regulations, see ante, 219, 20.

## 221. — Nature and form.

**App. 1876.** In an action against a carrier by a shipper of cattle for negligence whereby they were injured, plaintiff was not required to sue on his written contract with the carrier; such written contract being a mere modification in some respects of the obligations of the defendant imposed on it by law.—*Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

**App. 1886.** A petition alleged that plaintiff contracted with defendant to carry and transport for plaintiff a car load of cattle, that one of the steers was allowed to escape from the car, and that afterwards defendant found such steer and sold and converted it to its use, wherefore judgment was prayed. *Held*, that the petition set out but one cause of action, and that in trover.—*Johnson v. Wabash, St. L. & P. R. Co.*, 22 Mo. App. 597.

**App. 1903.** The fact that a shipment of live stock is delayed, and the property in-

jured and depreciated in value, will not give the shipper the right to terminate the relation of bailment by abandoning the property, and charging the carrier as for a conversion.—*Spalding v. Chicago, B. & Q. R. Co.*, 73 S.W. 274, 101 Mo. App. 225.

**App. 1925.** Common-law remedy available in shipper's action for delay in furnishing cars and transporting live stock, notwithstanding various statutes.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

#### 222. — Rights of action.

**App. 1908.** Action on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not, and, in an action against a railway company for injuries to horses shipped by plaintiff, evidence that plaintiff was not the owner of the horses was properly rejected.—*Van Buskirk v. Quincy, O. & K. C. R. Co.*, 111 S.W. 832, 131 Mo. App. 357.

**App. 1910.** The person in whose name a contract to transport live stock was made is the proper party to sue thereon; ownership of the stock being immaterial.—*Bennett v. Chicago, R. I. & P. Ry. Co.*, 131 S.W. 770, 151 Mo. App. 293.

**App. 1914.** The consignor of stock shipped may recover for injuries to the animals without further proof of ownership.—*Barr & Wiseman v. Quincy, O. & K. C. R. Co.*, 163 S.W. 573, 181 Mo. App. 88.

**App. 1926.** Manager of farmers' live stock shippers' association, who attended to shipping hogs and received and distributed returns, *held* to have sufficient interest to maintain action against carrier for loss in shipment.—*Griggs v. St. Louis & H. R. Co.*, 285 S.W. 159.

#### 223. — Defenses.

Shipper's failure to accompany stock, see ante, 217(1).

**App. 1908.** Where a verbal agreement is made between a shipper and a carrier to furnish stock cars at a certain time, and to deliver immediately, and this agreement is breached by the carrier, the shipper does not, by subsequently shipping his goods in a car furnished by the carrier, and taking a bill of lading reciting that the carrier does not agree to deliver the stock at destination at any specified time, preclude himself from recovering damages for the breach of the oral

agreement.—*Meriwether v. Quincy, O. & K. C. R. Co.*, 107 S.W. 434, 128 Mo. App. 647.

It is no defense to an action for breach of an agreement to furnish cars at a specified time that the carrier was unable to furnish such cars on the date agreed on by answer of heavy traffic, and portions of the answer alleging such defense are properly stricken.—*Id.*

**App. 1910.** A carrier sued for delay in transporting live stock cannot rely on defendant's failure to give notice of his damage on discovery thereof as required by the contract where the contract was not in evidence.—*Bennett v. Chicago, R. I. & P. Ry. Co.*, 131 S.W. 770, 151 Mo. App. 293.

**App. 1920.** If an embargo on all live stock shipments on account of weather conditions was justified, it was a defense, in an action for damages for failure to promptly ship hogs, that the shipper was promptly notified thereof, even after the hogs were in the pens ready for shipment.—*Stewart v. Chicago, B. & Q. R. Co.*, 222 S.W. 1029.

**App. 1925.** Defendant's answer that injunction proceedings had been instituted against striking shopmen *held* not to present a defense.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

Defendant's answer as to exemption from liability for delay in furnishing cars *held* not to present a defense.—*Id.*

Defendant's answer to count for delay in furnishing cars, relative to plaintiff's failure to give notice before removing injured stock from car, *held* not to present a defense.—*Id.*

#### 224. — Jurisdiction and venue.

**App. 1911.** Rev. St. 1909, § 5446, provides that in any suit for loss or injury to property transported plaintiff may join as defendants the original carrier and all connecting carriers, and recover from the carrier through whose negligence the loss was sustained, and may prosecute such action in any county in which a suit may be maintained against either of the carriers. *Held* that, where defendant B. Company transported cattle as a connecting carrier, plaintiff was entitled to sue in the county from which the cattle were shipped, and in which the initial carrier did business, though defendant B. Company's railroad did not pass through that county, and it had not place of business there, and was served in another county.—*Lay v.*

Chicago, B. & Q. R. Co., 138 S.W. 884, 157 Mo. App. 467.

225. — Time to sue, and limitations.

See explanation, page iii.

226. — Parties.

**Sup. 1883.** The party in whose name a contract for the transportation of cattle was made was the proper party to sue for injury to them in transportation; the question of ownership being immaterial.—*Achison v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. 213.

**App. 1919.** Owners of a joint shipment of cattle may join in a suit to recover damages sustained by each.—*McMickle v. Wabash Ry. Co.*, 209 S.W. 611.

227. — Pleading.

227 (1). Complaint.

**Sup. 1877.** In an action for the recovery of damages for the loss of hogs shipped over defendant's road, begun before a justice of the peace, a petition stating that plaintiff delivered the hogs to defendant, who was a common carrier, that defendant undertook to convey the hogs to St. Louis, that only a part of the hogs were delivered at St. Louis, and that a certain number were not delivered, while irregular, is substantially an action *ex delicto*, and is not bad.—*Clark v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 440.

**Sup. 1884.** In an action against a railroad company, the petition charged that defendant did not exercise due and proper care in the carriage of hogs belonging to plaintiff, but that, on the contrary, the steamboat and equipments thereof were imperfect and insufficient, and that the defendant, its officers, servants and agents, improperly and negligently managed and conducted the steamboat, whereby the hogs were destroyed by fire. *Held*, that such allegation was sufficient, and was not objectionable as failing to state a cause of action.—*Carlisle v. Keokuk Northern Line Packet Co.*, 82 Mo. 40.

**Sup. 1887.** In an action against a common carrier to recover the value of a car load of mules destroyed by fire through defendant's negligence, the petition alleged the delivery and loss of the property while in defendant's possession as a common carrier, and charged negligence in managing and operating the train, whereby the car containing the mules was set on fire and the mules destroyed. *Held* that, even without the last

allegation of negligence, the petition was sufficient.—*McFadden v. Missouri Pac. Ry. Co.*, 4 S.W. 680, 92 Mo. 343, 1 Am. St. Rep. 721.

**Sup. 1908.** Damages to the market value of a horse injured in transportation being general damages need not be specifically pleaded while loss of earnings or use of animals being special damages must be specifically pleaded.—*Van Buskirk v. Quincy, O. & K. C. R. Co.*, 111 S.W. 832, 131 Mo. App. 357.

**App. 1889.** In the absence of a special contract and with certain other well-known exceptions, a common carrier is liable as an insurer, and therefore, where a shipper of stock, in an action for its loss, did not draw his petition upon the mere theory of charging defendant on its common-law liability as a common carrier, but further alleged that the stock was killed through the negligence and misconduct of defendant, the allegation of negligence and misconduct might have been regarded as surplusage.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1897.** A petition in a common-law action against a carrier for failing to perform its duty to transport live stock delivered to it for transportation, which alleges that the live stock delivered to the carrier for transportation died while in transit through the negligence of the carrier, sufficiently alleges the carrier's negligence.—*Lachner v. Adams Express Co.*, 72 Mo. App. 13.

**App. 1900.** A statement for delayed shipment of cattle, alleging the receipt of the cattle, which defendant for certain freight charges undertook to transport and deliver without delay, and averring a negligent failure to promptly deliver them, resulting in plaintiff's damage in a stipulated sum, is sufficient in a justice's court, since it apprises defendant of the nature of the complaint and bars another action.—*Glasscock v. Chicago, R. I. & P. Ry. Co.*, 86 Mo. App. 114.

**App. 1902.** In an action by a shipper against a railroad company, apparently for a breach of contract to furnish cars, the petition failed to set out the contract, but pleaded a failure of defendant to have cars ready to receive the shipper's cattle at 1 o'clock a. m., or until 4 o'clock a. m., which was too late for the cattle to reach a certain Chicago market, and asked for damages as though defendant had thereby broken a contract. *Held*, that the petition was fatally defective,

as pleading at most a breach of an unpleaded contract.—*Currell v. Hannibal & St. J. R. Co.*, 71 S.W. 113, 97 Mo. App. 93.

**App. 1912.** A shipper who alleges that he cannot determine the liability of each carrier because of their close business arrangements *held* not relieved from stating a cause of action against the initial and connecting carriers jointly or from proving a joint responsibility.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 1199, 164 Mo. App. 444, adopting opinion (1911) 134 S.W. 665, 154 Mo. App. 420.

**App. 1915.** A petition *held* to state a good cause of action for breach of a carrier's contract to furnish cars for a cattle shipment on a specified day.—*Dalton v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 77, 187 Mo. App. 691.

**App. 1917.** Petition asking damage to stock shipment from carrier's delay is sufficient if it charges facts showing unreasonable time consumed in transit with a general charge that it was a negligent delay.—*Baker v. Bush*, 194 S.W. 1061.

**App. 1919.** The defenses that loss was caused by the evil propensities of live freight, or by the act of the public enemy, or by the act of God, need not be referred to in the petition, but should be set up in the answer.—*Boyd v. St. Louis Express Co.*, 211 S.W. 702.

**App. 1920.** Plaintiff's petition, alleging the loading of a hog in good condition for transportation by defendant express company to a fixed destination and delivery of the hog dead, is not only sufficient to state a cause of action, but is sufficiently definite and certain, so as not to be subject to a motion to make more definite and certain.—*Browning v. Wells Fargo & Co. Express*, 219 S.W. 665.

**App. 1922.** Petition for death of hogs in transit alleging 14 hours was a reasonable time for transportation, but that defendant negligently handled the car while transporting the hogs and did not transport them in 14 hours, and that, by reason of the negligent handling of the hogs, and the failure to deliver them in a reasonable time, certain of them died, *held* based on negligence both in the handling of the car and in delay.—*Cloyd v. Wabash Ry. Co.*, 240 S.W. 885.

**App. 1924.** Petition, alleging notice to defendant railroad's station agent to furnish

car on certain day, his assurance that it would be furnished thereon, failure to do so, and "that such delays were unreasonable," etc., *held* sufficient, at least after verdict, to state cause of action for negligent failure to provide cars on reasonable notice of time they were needed.—*Walters v. Kansas City Southern Ry. Co.*, 266 S.W. 491.

**App. 1926.** Complaint against carrier for death of hogs *held* grounded on common-law liability as insurer.—*Griggs v. St. Louis & H. R. Co.*, 285 S.W. 159.

#### ← 227 (2). Answer.

**App. 1901.** In an action against a carrier for loss of an animal while in transitu, defendant pleaded a certain contract of affreightment. Plaintiff did not pretend to controvert the existence of such contract, but only the legal effect claimed for it by plaintiff. *Held*, that no reply was necessary.—*Bowring v. Wabash Ry. Co.*, 90 Mo. App. 324.

**App. 1902.** The answer, after a general denial, alleged a contract whereby it was to furnish cars on a certain day, in time for plaintiff's cattle to reach the Chicago market of a certain other day, and alleged that the cars were in readiness for plaintiff's use in due time, but that plaintiff refused to take them. The replication admitted the contract as pleaded in the answer. *Held*, that the subsequent pleadings did not supply the defects of the petition so as to justify a trial on the theory of an unpleaded contract whereby defendant agreed to have the cars ready at 1 a. m., and not for failure to furnish cars in time for the Chicago market.—*Currell v. Hannibal & St. J. R. Co.*, 71 S.W. 113, 97 Mo. App. 93.

**App. 1906.** A carrier sued for damages to a shipment of cattle shipped under a special contract stipulating that it should not be liable unless a claim in writing was filed within a specified time, must, in order to avail itself of the failure of the shipper to give notice of a claim, plead the same, though it files the contract with its answer.—*McNealey v. Chicago, B. & Q. Ry. Co.*, 95 S.W. 312, 119 Mo. App. 200.

**App. 1908.** Where the petition in an action against a carrier for breach of an agreement to furnish cars at a specified time contains a count seeking to recover for damages to the shipper from delays in transit, the defense that the carrier was unable to furnish the cars as agreed on because of the press of business as to such count is wholly irrelevant and properly stricken.—*Meriwether v. Quincy*,

O. & K. C. R. Co., 107 S.W. 434, 128 Mo. App. 647.

**App. 1909.** Under Rev. St. 1899, § 604 (Ann. St. 1906, p. 631), authorizing a general or specific denial and requiring the statement of new matter constituting a defense, a carrier, when sued in tort by a shipper of stock, must affirmatively plead the contract of carriage requiring notice of loss or injury to the stock.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276.

**App. 1916.** In action against carrier for damages to an interstate shipment of hogs, if defendant wished to rely on defensive terms in written contract not pleaded by plaintiff, it could set up written contract to obtain benefit of its provisions.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1920.** The carrier to be excused from liability for death of a hog in transit must plead and prove that it died from its own inherent weakness or vice.—*Burgher v. Wabash Ry. Co.*, 217 S.W. 854.

227 (2½). Reply.

See explanation, page iii.

227 (3). Issues, proof, and variance.

**Sup. 1883.** The petition alleged injury to cattle in transportation by reason of defendant's negligently causing them to be loaded into a defective and unsound car, and by reason of negligence in reloading and transporting them. *Held*, that evidence respecting the bedding in the car was improperly admitted.—*Atchison v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. 213.

**App. 1885.** Under an allegation that, after plaintiff had placed cattle in defendant railroad company's stock pens for transportation, defendant failed to furnish cars within the time agreed in the contract of shipment, whereby plaintiff was damaged, plaintiff may show that the pens were in a muddy condition, without a specific allegation of that fact.—*Armstrong v. Missouri Pac. Ry. Co.*, 17 Mo. App. 403.

**App. 1894.** Where the defense, in an action to recover mules shipped over defendant's railroad, was that the freight to E. was the amount named in the bill of lading, and that by a new contract plaintiffs agreed to pay an additional amount as freight to their destination, and no mistake was alleged, the admission of evidence of a mistake in the bill of lading was error.—*Scott Bros. v. Chicago & A. R. Co.*, 57 Mo. App. 345.

**App. 1894.** Where the petition in an action for injury to cattle by reason of the breaking of a stock-yard fence, permitting them to be stampeded, alleged that plaintiff arranged with defendant for a compensation to ship the cattle, and the answer was a general denial, it was not error to exclude the bill of lading, which was given to plaintiff after the cattle had escaped and were injured, and which was offered to escape liability under a clause contained therein, since under a general denial a defense in confession and avoidance cannot be made.—*Cooke v. Kansas City, Ft. S. & M. R. Co.*, 57 Mo. App. 471.

**App. 1899.** A variance between a petition charging that defendant agreed to carry horses from Kansas City to Indianapolis, and the written contract introduced in evidence, showing that it merely undertook to transport the stock from Kansas City to St. Louis and there deliver to a connecting carrier, was immaterial, where, under the further allegations of the petition, it clearly appeared that plaintiff sought only to hold defendant for damages done to the horses while carried from Kansas City to St. Louis.—*Cash v. Wabash R. Co.*, 81 Mo. App. 109.

**App. 1903.** In an action by a shipper of live stock against a carrier, the shipper alleged that the property was never received by him at its destination, and was utterly lost to him. The carrier answered, alleging that the property had been abandoned to it by the shipper while in transit, and that it had forwarded the property to market and sold it on the shipper's account, and tendered him the proceeds. This tender was renewed in the pleading. *Held*, that issues as to whether the amount tendered was the net amount actually realized from the sale, and whether it was the amount that should have been realized, were not determinable under the pleadings.—*Spalding v. Chicago, B. & Q. R. Co.*, 73 S.W. 274, 101 Mo. App. 225.

**App. 1906.** Where, in an action against a carrier for loss of certain sheep, plaintiff alleged that the sheep were lost because of defendant's negligence and carelessness and unnecessary violence in handling its trains carrying the sheep, but the proof showed that the sheep were lost from the carrier's pens before their transportation was begun, there was a fatal variance.—*Ficklin & Son v. Wabash R. Co.*, 92 S.W. 347, 115 Mo. App. 633.

**App. 1906.** Under the statute making the initial carrier responsible for any loss

sustained from negligent delay in the carriage of live stock, whether such carrier or a connecting carrier was at fault, proof that the delay in the transportation of plaintiff's cattle arose from the negligence of a connecting carrier constituted a material variance from the petition alleging such delay to be that of the initial carrier.—*Ingwersen v. St. Louis & H. Ry. Co.*, 92 S.W. 357, 116 Mo. App. 139.

**App. 1907.** Where, in an action against a carrier for delay in transportation of cattle, plaintiff alleged that the delay was the result of the carrier's negligence, mere proof that the transportation extended beyond a reasonable time was insufficient to charge the carrier with the results of such delay, in the absence of a showing that the delay was caused by the carrier's negligence.—*Ecton v. Chicago, B. & Q. Ry. Co.*, 102 S.W. 575, 125 Mo. App. 223.

Where, in an action for delay in transportation of cattle, plaintiff based his right to recover in his pleading on defendant's negligence in delaying the train at numerous points, objections that the train was the only train on which he was allowed to ship them, when in fact defendant had other trains that made a faster schedule, and that the train did not run as fast as it should, and that its schedule was unreasonably slow, were not within the issues.—*Id.*

**App. 1908.** A petition in an action for injuries to a horse while being unloaded from a car alleged that the platform where defendant required plaintiff to unload the horse was a dangerous and unsafe place to unload and from which to remove the horse, and that the injury was caused by the foot of the horse being caught on a spike in the track adjoining the platform. The evidence showed that the platform itself was safe, but that in being led from the platform the horse stepped on a projecting spike on an adjoining track, and was injured. *Held*, that the evidence was sufficient to sustain the allegations of the petition and to show negligence, though the platform itself was safe.—*Letts v. Wabash R. Co.*, 111 S.W. 138, 131 Mo. App. 270.

**App. 1909.** In an action for damages to horses shipped, claimed to have been caused by defendant's negligence in handling the train by which some of the horses were thrown down and injured, evidence was improperly admitted to show damage caused by delay at a junction point in forwarding the horses.—*Barr v. Quincy, O. & K. O. R. Co.*, 120 S.W. 111, 138 Mo. App. 471.

**App. 1909.** Where plaintiff's cause of action for damages for a carrier's delay in transportation of cattle was based entirely on the alleged breach of carrier's obligation to transport the cattle within a reasonable time, evidence that a portion of the delay was caused by the carrier's breach of a parol contract to furnish cars sanded and bedded, so that they might be immediately used, was inadmissible.—*Burgher v. Wabash R. Co.*, 120 S.W. 673, 139 Mo. App. 62.

**App. 1910.** Where the only cause of action declared on in the petition was defendant railroad's negligent failure to transport plaintiff's hogs promptly, plaintiff could not recover for injuries to the hogs while being loaded or unloaded by defendant's employes.—*Hunter v. St. Louis Southwestern R. Co.*, 126 S.W. 254, 147 Mo. App. 28.

**App. 1912.** Where a shipper of live stock brings an action against the carrier on the ground of negligence, he cannot recover on mere proof of delay, without evidence of negligence.—*McDowell v. Missouri Pac. Ry. Co.*, 152 S.W. 435, 167 Mo. App. 576.

**App. 1917.** Plaintiff could not recover damages caused by rough handling of stock shipment where the only negligence alleged was carrier's delay.—*Baker v. Bush*, 194 S.W. 1061.

**App. 1918.** In action for damages to interstate shipment of live stock, where railroad company's liability was governed by Carmack Amendment as altered by Cummins Amendment of 1916, *held*, that plaintiff, having alleged company's negligence instead of relying on its common-law liability as insurer, must prove it as alleged.—*Robinson v. Bush*, 200 S.W. 757, 199 Mo. App. 184.

**App. 1918.** Where a shipper seeking to recover for injuries to live stock bases his action on negligence of the railroad company instead of its liability as an insurer, he must prove the negligence as alleged.—*Crow v. Bush*, 200 S.W. 762.

**App. 1919.** In action for unreasonable delay in delivery of cattle shipment, plaintiffs cannot recover, where their evidence discloses an excusing cause, though no excusing cause was pleaded.—*McMickle v. Wabash Ry. Co.*, 209 S.W. 611.

**App. 1919.** Where express company, sued for loss of hog, did not plead the defense that the loss was caused by the inherent viciousness of propensities of the hog, defendant had no right to show it or claim

protection from it, unless it appeared in the testimony of plaintiff.—*Boyd v. St. Louis Express Co.*, 211 S.W. 702.

**App. 1920.** In an action against a railroad for breach of an inseparable contract for the shipment of cattle and the furnishing of cars therefor, the cause alleged was not supported by evidence showing a contract made verbally over the telephone for the furnishing of cars, and a shipment contract in writing.—*Thee v. Wabash Ry. Co.*, 217 S.W. 566.

**App. 1920.** In an action against the federal Director General of Railroads for damage to live stock in transit, where plaintiff did not prove the allegation, on which he based recovery, that the expression in the contract of shipment "36-hour release" had a well-known, usual, and customary meaning which meaning was the basis of his claimed cause of action, judgment for him cannot stand.—*Bradford v. McAdoo*, 219 S.W. 92, 202 Mo. App. 412.

**App. 1922.** In an action for negligent delay in transporting live stock to market, an objection that the shipper could not recover for negligence in placing the cars on a side truck and leaving the cattle where they could not get sufficient air and ventilation, since the shipper's agent saw where they were placed and made no complaint, *held* untenable, it being tantamount to a plea of estoppel or waiver, and, since the answer was only a general denial, the carrier could not be heard to urge the defense.—*Neely v. Hines*, 237 S.W. 906.

**App. 1922.** Where recovery for the death of hogs during shipment was sought solely for the breach of the carrier's common-law duty to deliver in as good condition as when received, the shipper need not allege negligence on the part of the carrier, and is under no duty to show negligence until the carrier pleads and proves facts tending to bring the loss within one of the exceptions to a carrier's common-law liability; such exceptions being the act of God or the public enemy, the inherent vices, propensities, or disease of the animals, or the fault of the shipper.—*Erisman v. Wabash Ry. Co.*, 243 S.W. 237.

**App. 1924.** Where plaintiff suing for injuries to animals in transit declared on common-law contract, and proved special contract inconsistent with common-law liability of defendant, there was failure of proof, and demurrer to evidence should have been sustained.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

**App. 1925.** In action for death of live stock during shipment, proof of specific acts of negligence not necessary under general allegation thereof.—*Long v. American Ry. Express Co.*, 274 S.W. 906, 219 Mo. App. 451.

**App. 1926.** Testimony as to amount of shrinkage of sheep and lambs when taken by shipper from stock pens, put on pasture, and later shipped to market, *held* incompetent.—*Mourer v. Wabash Ry. Co.*, 280 S.W. 1050.

**App. 1926.** Shipper in case of injury to animals in unaccompanied live stock shipment, under general charge of negligence, need not prove specific acts.—*Shaffer v. American Ry. Express Co.*, 282 S.W. 725.

**App. 1927.** Court properly refused to require plaintiffs to introduce contract of shipment which was not made part of case against carrier.—*Morrow v. Wabash Ry. Co.*, 289 S.W. 343.

**App. 1929.** Evidence of fact, not alleged, that delay in shipment of cattle caused change in condition, decreasing market value, *held* inadmissible.—*Crowell v. St. Louis-San Francisco Ry. Co.*, 11 S.W.(2d) 1055.

## 228. — Evidence.

### 228 (1). Presumptions and burden of proof in general.

**Sup. 1877.** Where a contract for the shipment of hogs relieves the carrier from all liability except that caused by its negligence, the burden of proving negligence on the carrier's part, which will entitle the shipper to recovery, is on the shipper.—*Clark v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 440.

**Sup. 1900.** Under Rev. St. 1889, § 2594, providing that an injury to live stock, where two different kinds are shipped in the same car, shall be presumed to result from the mixed shipment, it is error to instruct that the presumption is rebutted by showing the failure of the carrier to furnish cars with trapdoors, as required by section 2590.—*Padlock v. Missouri Pac. Ry. Co.*, 56 S.W. 453, 155 Mo. 524.

Cattle and hogs were shipped in a car which was not provided with trapdoors, as required by Rev. St. 1889, § 2590. There was a partition in the car, but the hogs could get through it. An agent of shipper was with the stock, and when they got in a bunch he tried to get them up from the outside, and then asked a train man for an ax to get into the car, and was informed that there was none. When the stock reached the destina-

tion several hogs were dead, and were sold without notifying the carrier. *Held* not sufficient to rebut the presumption created by section 2594 that the injury was a result of the mixed shipment.—*Id.*

**Sup. 1919.** In an action against a railroad for damage to a shipment of live stock, the instruction that mere delay, of itself, was no evidence of negligence, without explanation and qualification of what was meant by mere delay, was properly refused, as contrary to Public Service Commission Act, § 40 (Rev. St. 1909, § 3121, as amended by Acts 1913, p. 177).—*Cunningham v. Chicago & A. R. Co.*, 215 S.W. 5.

**App.** Where live stock injured in transit was accompanied by the owner, his agent, or representative, the burden is on the owner to show the carrier's negligence.—(1886) *McBeath v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 445; (1912) *Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273; (1916) *Kolkmeier v. Chicago & A. R. Co.*, 182 S.W. 794, 192 Mo. App. 188; *Cunningham v. Chicago & A. R. Co.*, 182 S.W. 1033; *Bailey v. Same*, 182 S.W. 1034.

**App. 1894.** Where, on the day after the arrival of live stock, and notice to the consignee of the arrival thereof, the carrier refused to deliver it on the tender of a certain amount, it cannot be assumed that the refusal was merely because the amount tendered was not equal to the amount claimed for freight, and not because it did not include the day's charges for feed, which the carrier, with the consignee's consent, had caused to be given to the animals.—*Scott Bros. v. Chicago & A. R. Co.*, 57 Mo. App. 345.

**App. 1895.** In an action against a railroad company for injuries to hogs shipped over its line in a car with cattle, evidence examined, and *held* to overcome the presumption that the injuries resulted from such mixed shipment, arising from Rev. St. 1889, § 2594, providing that, in mixed shipments, the shipper must assume the risks incident to such shipments.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

**App. 1896.** In an action against a carrier for damage to live stock, it is not sufficient for the shipper to show merely that the stock was delivered in good condition and that it was redelivered in a damaged condition; but he must go further, and offer some evidence tending to prove an injury by human agency, causing or concurring to cause the

loss.—*Hance v. Pacific Express Co.*, 66 Mo. App. 486.

**App. 1902.** Evidence that it took 24 hours to transport cattle to a certain place, when the usual time was from 13 to 15 hours, and that the train was delayed at more than one place from 2 to 4 hours, is sufficient to raise a presumption of the carrier's negligence, in an action by the shipper for damages.—*Anderson v. Atchison, T. & S. F. Ry. Co.*, 67 S.W. 707, 93 Mo. App. 677.

**App.** In an action for damages from delay resulting in loss, it is not sufficient for plaintiffs merely to show delay, but the burden is on them to prove negligent delay.—(1904) *McCrary v. Chicago & A. Ry. Co.*, 83 S.W. 82, 109 Mo. App. 567; (1906) *Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644; (1909) *Clark v. St. Joseph & G. I. Ry. Co.*, 122 S.W. 318, 138 Mo. App. 424; (1911) *Lay v. Chicago, B. & Q. R. Co.*, 138 S.W. 884, 157 Mo. App. 467; (1913) *Gregory v. Chicago, B. & Q. R. Co.*, 160 S.W. 830, 174 Mo. App. 550; (1914) *Weesen v. Missouri Pac. Ry. Co.*, 162 S.W. 304, 175 Mo. App. 374; (1915) *Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639; *Dalton v. Same*, 173 S.W. 77, 187 Mo. App. 691; (1921) *Neeley v. Hines*, 227 S.W. 650, 206 Mo. App. 621; (1922) *Howell v. Hines*, 236 S.W. 886; *Neely v. Hines*, 237 S.W. 906; *Harrison v. Chicago & A. R. Co.*, 239 S.W. 871, 209 Mo. App. 526; *Cloyd v. Wabash Ry. Co.*, 240 S.W. 885; (1924) *Sandker v. Wabash Ry. Co.*, 267 S.W. 957; *Phillippi v. Same*, 267 S.W. 960.

**App. 1905.** Where hogs were lost in transit, it would be presumed, in the absence of proof to the contrary, that they escaped while in the hands of the last connecting carrier.—*Jones v. St. Louis & S. F. R. Co.*, 91 S.W. 158, 115 Mo. App. 232.

**App. 1906.** Where, in an action against a carrier for delay in shipping plaintiff's cattle, plaintiff founded his cause of action solely on defendant's negligence in furnishing cars and in transportation, the burden was on plaintiff to show that defendant was negligent in fact either in furnishing the cars or in the transportation, and that such negligence was the proximate cause of the damage suffered.—*Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211.

**App. 1906.** In an action for injuries to live stock in shipment, proof that the injuries resulted from a delay caused by a wreck on the carrier's road raised a presumption of



negligence on the part of the carrier.—*McFall v. Wabash R. Co.*, 94 S.W. 570, 117 Mo. App. 477.

**App. 1906.** In an action against a carrier for damages to a shipment from the alleged negligence of the carrier, the burden is on plaintiff to prove negligence.—*Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

**App. 1908.** In an action against a railway for failure to provide within a reasonable time cars for plaintiff's shipment of live stock, the burden was on plaintiff to show that defendant owned and operated a railroad at the shipping point.—*Brandon v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 540, 134 Mo. App. 89.

**App. 1909.** Proof that delay in the transportation of a shipment of stock was caused by a wreck of the train established a *prima facie* case of negligence; and the carrier, to escape liability, must prove that the wreck was an unavoidable accident.—*Thompson v. Quincy, O. & K. C. R. Co.*, 117 S.W. 1193, 136 Mo. App. 404.

**App. 1909.** The burden is on a shipper who sues a carrier for injuries to one of two animals shipped together to show that the animal injured did not receive its injuries by reason of the vicious propensities of the other animal, but the burden is sustained by very slight proof, and may be established by collateral circumstances affording a reasonable inference of negligence on the carrier's part.—*Foust v. Lee*, 119 S.W. 505, 138 Mo. App. 722.

**App. 1910.** In an action against a carrier for delay in carrying a shipment of live stock, plaintiff sustains his burden of proving that the delay was the result of negligence by showing that the transportation was interrupted by a wreck on defendant's road, without showing that the wreck was the result of negligence, as a wreck is presumed to have resulted from negligence.—*Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S.W. 1185, 141 Mo. App. 453.

In an action for delay in the transportation of live stock, the burden is on the shipper throughout the trial to show that the cause of the delay was negligence by the carrier.—*Id.*

**App. 1910.** In an action against a carrier for damages by delivering inferior cattle belonging to another to plaintiff's consignee in place of those shipped by him, the burden is on plaintiff to show the market value of the

cattle shipped and those delivered as his, to enable the jury to determine the difference in assessing damages.—*Edwards v. Lee*, 126 S.W. 194, 147 Mo. App. 38.

**App. 1910.** One suing a carrier of live stock for negligent loss and delay in transportation, not based on a breach of his common-law duty as insurer, has the burden to prove negligence.—*Decker v. Missouri Pac. Ry. Co.*, 131 S.W. 118, 149 Mo. App. 534.

Mere proof of unusual delay in transporting live stock does not of itself show negligence, but circumstances even slightly tending to show a negligent origin of the delay will support an inference of negligence.—*Id.*

Where live stock were lost in transportation and the circumstances are unexplained, it is presumptive evidence of the carrier's negligence.—*Id.*

**App. 1913.** Shipper *held* to have the burden of showing that injuries to live stock not pointing to external violence were due to the carrier's negligence, and an instruction that, having proved a delay in transportation, the burden was on the carrier to show that it was not the result of negligence, was erroneous.—*Winslow v. Chicago & A. R. Co.*, 157 S.W. 96, 170 Mo. App. 617.

**App. 1915.** Shipper of live stock *held* to have burden of establishing negligence by affirmative proof, where cause of action for delay in transportation arose prior to amendment of Rev. St. 1909, § 3121, by Laws 1913, p. 177.—*Smith v. Missouri Pac. Ry. Co.*, 183 S.W. 701.

**App. 1916.** Mere delay in the delivery of live stock at destination, unless very extraordinary does not raise inference of negligence of carrier.—*Patterson v. Chicago & A. Ry. Co.*, 182 S.W. 1034.

No negligence can be imputed to a carrier because of a delay overnight at a division point in making connection with a train on the carrier's branch line.—*Id.*

**App.** A carrier of live stock has the burden of explaining or excusing a delay.—(1917) *Baker v. Bush*, 194 S.W. 1061; (1920) *Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App.** Mere proof of injury to shipment of live stock in transit will not make *prima facie* showing of negligent operation of train so as to cast burden of disproving negligence on carrier.—(1918) *Robinson v. Bush*, 200 S.

W. 757, 199 Mo. App. 184; (1922) *Cloyd v. Wabash Ry. Co.*, 240 S.W. 885.

**App. 1919.** In case of an interstate shipment of stock, questions of burden of proof are a matter of substance and are not controlled by the laws of the several states; so a shipper urging negligent delay has the burden of proof, regardless of the state statute, that being the ordinary rule.—*Berry v. Chicago & A. R. Co.*, 208 S.W. 622.

**App. 1919.** In action for delay in interstate shipment of live stock, burden of proving that delay was occasioned by defendant's negligence was upon plaintiff, notwithstanding Laws 1913, p. 177, making proof of unreasonable delay prima facie evidence of negligence; the burden of proof being a matter of substance, and hence governed, as to interstate shipments, by the federal laws, and not the state laws.—*Baker v. Schaff*, 211 S.W. 103.

**App.** The carrier to be excused from liability for death of an animal in transit must prove that it died from its own inherent weakness or vice.—(1919) *Boyd v. St. Louis Express Co.*, 211 S.W. 702; (1920) *Burgher v. Wabash Ry. Co.*, 217 S.W. 854.

**App. 1920.** In an action by a shipper of cattle for damages caused by delay in transit, the burden was upon the carrier, where delay was caused by unsuccessful attempts to make a coupling with a snowplow to show that the delay was unavoidable.—*Gilbreath v. Atchison, T. & S. F. R. R.*, 217 S.W. 636.

**App. 1920.** In an action for failure to properly carry and deliver live stock, the burden was on plaintiff shipper to show the injuries to a cow were not inflicted by the vice of the animal or its inherent vicious propensities, and to show that the injury was caused through some human agency, but very slight proof of negligence in such respect transferred the burden to the carrier, and the fact could be established from collateral facts and circumstances affording a reasonable inference of negligence.—*Byrum v. Chicago & A. R. Co.*, 226 S.W. 91.

**App. 1921.** In an action for loss and injury to hogs in transit, it was incumbent on plaintiffs not only to show that the hogs were kept in a place where they did not get sufficient air and ventilation on a hot day, as alleged, but the carrier had some other track at the point involved where they could have been placed without suffering from an insufficiency of ventilation.—*Howell v. Hines*, 227 S.W. 619.

**App. 1921.** Under the Carmack Amendment (49 USCA § 20), the burden of proving actual negligence causing delay of an interstate stock shipment is on the shipper, and unusual delay in transporting a shipment is not presumptive evidence of negligence.—*Holland v. Hines*, 234 S.W. 366.

**App. 1921.** A shipper whose case against a carrier is based on a specific act of negligence, as failure to furnish a clean car as required by Rev. St. 1919, §§ 10004, 10005, and not on the common-law liability of the carrier as an insurer, has the burden of proving that such negligence caused or was an active co-operative cause in producing the damage.—*Rhodes v. Missouri Pac. R. Co.*, 234 S.W. 1026.

**App. 1921.** The mere fact that hogs, apparently sound when delivered for shipment, arrive at their destination sick with pneumonia, raises no presumption of negligence on the part of the carrier.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1922.** In an action by a shipper for damage to an unaccompanied interstate shipment of hogs, proof of delivery of the hogs to the shipper in good condition, and that some were dead on redelivery by the carrier, made a prima facie case for the shipper, and cast the burden on the carrier to show that the loss or injury was caused by the animals' own vice or inherent infirmity and without fault on the part of the carrier.—*Hartford Fire Ins. Co. v. Payne*, 243 S.W. 357, certiorari quashed (1923) *State ex rel. Hartford Fire Ins. Co. v. Trimble*, 250 S.W. 393, 298 Mo. 418.

**App. 1922.** A live stock carrier, which seeks to bring itself within exceptions to rule making such carrier liable for failure to deliver the live stock in a safe and sound condition, that such carrier is not liable if such failure was due to the act of God, the public enemy, the inherent vice or nature of the animal, or its vicious propensities, or the fault of the shipper, has the burden of proving itself within one of such exceptions.—*Sullivan v. American Ry. Express Co.*, 245 S.W. 375, 211 Mo. App. 123.

Where live stock shipper bases his cause of action against carrier upon the negligence and not on the carrier's common-law duty to deliver the live stock in a safe and sound condition, he must prove such negligence to recover.—*Id.*

**App. 1923.** In an action for damages to an interstate shipment of live stock plain-

tiff to recover must prove his charge of negligence.—*Sinclair v. Missouri, K. & T. Ry. Co.*, 253 S.W. 380.

**App. 1923.** In an action against a carrier for damage to live stock shipment, it is not sufficient for the shipper to show delivery to carrier in good condition and redelivery in damaged condition, but he must further offer some evidence tending to prove an injury by human agency causing or concurring to cause the loss, which evidence places the burden on the carrier to show due diligence.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

In action involving issue as to whether the injury and death of horses were caused by their evil propensities or by the negligence of a carrier, proof that the animals on arrival at destination bore evidence of external violence did not, as charged, create presumption of negligence, but it was necessary for shipper to show that such injuries were not brought about by the natural propensities of the animals, but through the rough handling of the train.—*Id.*

**App. 1923.** In shipper's action against railroad for refusal to accept cattle for shipment on certain date pursuant to agreement for shipment of the cattle into other state, the burden was on the shipper to prove actual negligence in view of the federal rule.—*Crowdis v. Quincy, O. & K. C. R. Co.*, 255 S.W. 347.

**App. 1924.** If condition of animals suggests injuries from external violence during transportation, and evinces a condition not usually attendant on carriage with due care, it is sufficient to repel presumption pertaining to proper vice, and to cast burden on carrier of showing no negligence.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

**App. 1924.** Under federal rule, burden is on plaintiffs, suing for negligent failure to furnish cars after notice of time desired, to prove actual negligence in connection with such failure.—*Walters v. Kansas City Southern Ry. Co.*, 266 S.W. 491.

**App. 1925.** Plaintiffs may plead carrier's common-law liability as insurer for injuries to animals in interstate transit and make prima facie case by proving delivery to carrier in good condition and delivery by it in bad condition.—*Morrow v. Wabash Ry. Co.*, 276 S.W. 1030, 220 Mo. App. 518.

**App. 1929.** One suing carrier for delay in interstate shipment of cattle has burden of showing that delay resulted from defendant's negligence (Rev. St. 1919, § 9926).—*Crowell v. St. Louis-San Francisco Ry. Co.*, 11 S.W.(2d) 1055.

#### 228 (2). Limitation of Liability.

**App. 1889.** In an action by a shipper against a carrier for the loss of a horse, the defendant set up a special contract limiting its liability. *Held*, that whether such contract had been in fact signed at the time when the horse was killed was a material fact, the burden of establishing which was on defendant.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1894.** Where the defendant, in an action for loss of stock shipped over its railroad, relied on the bill of lading, which exempted it from liability for loss from certain causes, the burden is on the carrier to show that the loss was within the exception, and that its negligence was not a co-operating cause.—*George v. Chicago, R. I. & P. Ry. Co.*, 57 Mo. App. 358.

**App. 1898.** Where a contract of shipment recites that the freight rate named was a reduced rate, in an action to recover for injuries to cattle shipped, it devolved on the plaintiff to show that it was not, and thereby defeat the contract in that respect by destroying the consideration.—*Bowring v. Wabash Ry. Co.*, 77 Mo. App. 250.

**App. 1906.** Where, on shipment of a carload of hogs, two were missing on their delivery by the carrier, the burden of proof was on the carrier to show that the loss fell within a provision exempting it from liability in consequence of the escape of any of the stock through the doors and openings in the cars.—*McFall v. Wabash R. Co.*, 94 S.W. 570, 117 Mo. App. 477.

**App. 1906.** In an action against a carrier for delay in the transportation of cattle, where the contract of shipment exempted the carrier from liability on account of delays, the burden was on plaintiff to show that the unusual and injurious delays were the result of negligence, and not such as were unavoidable.—*Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618.

**App. 1908.** A contract for shipment of hogs recited that it was based on a reduced rate, that the rate mentioned therein was a reduced rate, and that in consideration of such reduced rate the stipulations therein con-

tained were entered into. The application for the contract, signed by the shipper, recited that he knew that the carrier had two rates of freight, one a higher rate, on which it accepted shipments at the carrier's risk, and a lesser rate, under which shipments were made on the shipper relieving the carrier from specified common-law liabilities and agreeing to the limitations contained in the contract, and that the shipper had exercised his option and chosen the lesser rate. *Held*, that the contract was *prima facie* supported by a valid consideration, and the shipper, to avoid it, must show that no consideration was in fact given; since the rule is that, while a recital of a consideration in a contract of shipment is not conclusive evidence thereof, it is *prima facie* evidence.—*Shelton v. St. Louis & S. F. R. Co.*, 110 S.W. 627, 131 Mo. App. 560.

**App. 1908.** Where plaintiff's horses were transported under a special contract exempting the carrier from liability for delay, the burden was on plaintiff to show that the delay was unreasonable, and resulted from defendant's negligence.—*Gilbert v. Chicago, R. I. & P. Ry. Co.*, 112 S.W. 1002, 132 Mo. App. 697.

**App. 1909.** An action for negligent delay in transporting live stock being in tort for defendant's violation of its common-law duty and not on the contract of shipment, the plaintiff makes out a *prima facie* case by proving the delay and consequent loss, and the burden is on the defendant to show nonperformance of a stipulation in the bill of lading requiring notice of claim for damages as a part of its defense.—*Brown v. St. Louis & S. F. Ry. Co.*, 117 S.W. 112, 135 Mo. App. 624.

**App. 1914.** The burden is on the shipper suing for damage to live stock to show that there was no consideration for a provision, in the bill of lading covering an interstate shipment, requiring notice of claim for damage to be given within five days after the stock is unloaded.—*Hamilton v. Chicago & A. R. Co.*, 164 S.W. 248, 177 Mo. App. 145.

The burden is on a shipper suing for damage to live stock in interstate shipment to prove that notice of claim for injury was given within five days after the cattle were unloaded, as required by bill of lading.—*Id.*

#### ☞228 (3). Admissibility of evidence in general.

**Sup. 1877.** Where one of several animals shipped by plaintiff over defendant railroad disappeared in transit, evidence as to what the freight agent said to plaintiff, at the time

he was notified of the loss, was admissible for the purpose of proving that the notice in writing required by the contract of shipment might have been waived by what was said.—*Oxley v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 629.

**Sup. 1878.** In an action against a carrier for injury to a shipment of mules, the petition averred that the train conveying the mules arrived at the point of intersection with the connecting carrier at a certain time; that plaintiff, learning that the mules would be detained there for some time awaiting the train of the connecting carrier, requested defendant to place the cars on the track at the stock pen, so that he might unload and water and feed them, but that defendant failed to do so, to plaintiff's damage, etc. *Held* proper to receive plaintiff's testimony that he requested the agent at the point of shipment to telegraph the agent at the point of intersection that he would arrive that evening with two cars of mules, and to be ready to ship them, particularly in view of testimony of the agent of the connecting carrier that it was customary for the agent at the point of shipment to telegraph in such cases, and that his trains were held to receive the shipments.—*Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

**Sup. 1919.** In an action against a railroad for damage to castrated bulls through delay in transit, plaintiff's testimony, showing the difference in the weight of the cattle at shipping point and their weight when unloaded at destination, *held* not improperly received, as not taking into consideration the fact that the cattle were castrated just before being shipped.—*Cunningham v. Chicago & A. R. Co.*, 215 S.W. 5.

**App. 1885.** In an action for failure to furnish cars to transport stock as agreed, accounts of sales sent by a commission merchant to his principal are not evidence of the value or weight of stock in the market.—*Hoskins v. Missouri Pac. Ry. Co.*, 19 Mo. App. 315.

**App. 1895.** In an action for injuries to hogs by reason of the failure to have trap doors in the top of the car in which they were shipped, evidence of a conversation of plaintiff's son with the trainmen, when he went to get an ax to chop holes in the roof, so as to get at the hogs, was admissible as showing the effort he had made toward saving the hogs.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

**App. 1898.** In an action against a carrier for damages on account of injuries to a

car load of horses, plaintiff was properly allowed to testify, respecting his damages, as to the amount he paid for feeding and doctoring the horses after they arrived at their destination before he could get them into salable condition.—*Matney v. Chicago, R. I. & P. Ry. Co.*, 75 Mo. App. 233.

**App. 1906.** In an action to recover for the loss of live stock shipped, evidence of a conversation between the shippers and the claim agent of the carrier when they were making an effort to adjust the loss was admissible to show waiver of notice of loss, though not to prove the loss itself.—*Jones v. Quincy, O. & K. C. R. Co.*, 94 S.W. 733, 117 Mo. App. 523.

**App. 1907.** In an action against a railroad for injuries to plaintiff's shipment of hogs, resulting from defendant's wrongful exposure of them during transportation to a virulent disease, evidence that subsequent to the transportation the hogs communicated the disease to other hogs was admissible.—*Council v. St. Louis & S. F. R. Co.*, 100 S.W. 57, 123 Mo. App. 432.

In an action against a railroad for injuries to plaintiff's shipment of live stock, resulting from defendant's alleged wrongful exposure of the stock during transportation to a virulent disease, it was competent for witnesses for plaintiff who were in a position to observe the physical surroundings to state that the car containing plaintiff's stock could have been moved to and from the point of its destination without being first switched into the infected district.—*Id.*

**App. 1909.** The cause of injury to stock during transit may be shown from collateral facts affording a reasonable inference of negligence.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276.

**App. 1909.** In an action against a carrier for breach of its common-law duty to transport plaintiff's cattle within a reasonable time, the carrier was only responsible for delay resulting after the cattle were delivered to it for transportation, and hence evidence that the shipment was delayed several hours because the carrier failed to furnish cars sanded and bedded, as it had agreed to do, while plaintiff was preparing the cars for use, was inadmissible.—*Burgher v. Wabash R. Co.*, 120 S.W. 673, 139 Mo. App. 62.

**App. 1911.** To establish negligence it was proper to show that a carrier, sued for delay in delivering live stock, had never be-

fore taken a train out without a shipment, when part of it was loaded and the remainder in process of loading.—*Moss v. Missouri, K. & T. Ry. Co.*, 134 S.W. 1070, 153 Mo. App. 602.

**App. 1913.** In an action against a carrier for delay in carrying mules, evidence as to the cost of placing the mules in a salable condition after the delay and of caring for them, and thereby reducing the loss to a minimum, is admissible.—*Wyatt v. Missouri Pac. Ry. Co.*, 158 S.W. 720, 173 Mo. App. 210.

**App. 1914.** In an action for damages for delay of a shipment of cattle, it was proper to show the difference between the normal shrinkage and the actual shrinkage.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 344, 181 Mo. App. 244.

**App. 1915.** Testimony of experienced stockmen as to what extra shrinkage delay in shipment would produce in cattle similar to those composing the shipment was admissible.—*Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639.

**App. 1915.** The action being for injuries to stock awaiting shipment, it was not error to exclude tariffs and classifications of the road on file with the Interstate Commerce Commission from evidence, where defendant railroad denied delivery of stock to it.—*Reading v. Chicago, B. & Q. R. Co.*, 173 S.W. 451, 188 Mo. App. 41.

**App. 1916.** In an action for damages to shipment of cattle, where there was evidence from which jury might find jolting, etc., evidence as to whether such jolting, etc., would cause cows to calve prematurely *held* admissible to prove a cause of the calving.—*Greening v. Chicago & N. W. Ry. Co.*, 183 S.W. 1121.

**App. 1916.** In suit for delay in shipment of live stock, exclusion from evidence of so-called schedules offered by defendant road, which were mere oral directions agreed to by road officials in informal conference and sent in letters to various agents, *held* proper.—*McFall v. St. Louis & S. F. R. Co.*, 185 S.W. 1157.

**App. 1919.** In action against carrier of stallion for failure to transport as expeditiously as required by statute after accepting for transportation, inquiry must be confined to ascertaining whether there was a failure to obey the statute after acceptance of the shipment, and the court can consider only evidence in relation to the movement of the shipment from and after it was accepted.

—*Strother v. Atchison, T. & S. F. R. Co.*, 212 S.W. 404.

**App. 1920.** In an action against a carrier for damages to a shipment of live stock, evidence by plaintiff that the cattle were in better condition when starting on the journey than they were when brought from another point to the point of shipment was not inadmissible; the carrier's defense being that the cattle were so poor and emaciated that they were not physically strong enough to endure the shipment.—*Cravens v. Hines*, 218 S.W. 912.

In action for damages to a shipment of live stock, evidence as to the condition of the cattle prior to shipment was not incompetent, notwithstanding that there was no allegation in the complaint that the cattle were in good condition when received for shipment; defendants having raised the issue in the answer.—*Id.*

In action for damage to a shipment of live stock because of rough handling and severe weather, it was not error to exclude the shipping contract whereby the shipper assumed all risk and expense of feeding, watering, and caring for the shipment, in effect shipping the cattle at his own risk, in view of Laws 1911, p. 153, providing that no carrier can by contract exempt itself from liability as a common carrier.—*Id.*

**App. 1920.** In action against initial carrier for delay in interstate shipment which had been rerouted to another destination, evidence of a promise of a "passenger run" over the new route *held* inadmissible.—*Miller v. Quincy, O. & K. C. R. Co.*, 225 S.W. 116, 205 Mo. App. 463.

In an action against an initial carrier for delay in transit of interstate shipment, evidence that conductor fretted at engineer for lack of speed without apparent cause was admissible.—*Id.*

**App. 1922.** In a suit against an interstate carrier made liable by 38 Stat. 1197 (49 USCA § 20(11), for the "full actual loss" sustained in case of injury to cattle, and wherein the measure of damages is the difference between their market value in the condition in which they arrived at their destination and their value had they arrived in good condition, evidence that the injured cattle did not fatten or respond to feed as well as did uninjured cattle in the same shipment, so that, though treated the same, they lacked 200 pounds of making the gain they should have

made, was admissible to support or justify the estimated depreciation in value.—*Carpenter v. Hines*, 239 S.W. 593.

**App. 1922.** In a shipper's action for delivery to the wrong consignee, it was not error to exclude evidence showing plaintiff's experience as a live stock shipper, and his acquaintance with the customary requirements, because these facts would tend to establish that plaintiff intended his caretaker to execute a shipping contract; the latter not being his agent except to accompany the cattle.—*Montgomery v. Davis*, 240 S.W. 282, 209 Mo. App. 698.

**App. 1922.** In shipper's action for the death of a buffalo, due to the carrier's negligence, there was no error in excluding evidence as to the value of the robe which the carrier was not entitled to salvage, and which plaintiff had made from the hide, which was not shown to have any value.—*Johnson v. American Ry. Express Co.*, 245 S.W. 1071.

**App. 1924.** In an action for damages arising from shrinkage of sheep in transit, alleged to have been caused by defendant's negligent delay in transporting them from Edina, Mo., to the stockyards at Chicago, Ill., admission of testimony as to the usual time of arrival of such shipment of sheep in Chicago *held* not error, such evidence, in the absence of any evidence by defendant in explanation of the unusual and apparently unnecessary delay, and in the face of plaintiff's evidence that the car was side-tracked at a certain point for 12 hours without any explanation by defendant, creating an inference of negligent delay, authorizing submission of the question to the jury.—*Prebe v. Quincy, O. & K. C. R. Co.*, 260 S.W. 816.

**App. 1925.** Testimony, that charges for treatment of cow during shipment never presented to shipper, properly admitted.—*Long v. American Ry. Express Co.*, 274 S.W. 906, 219 Mo. App. 451.

**App. 1926.** Rule of proof of negligence by circumstances in case of injury to unaccompanied live stock shipment *held* unaffected by contract requiring proof of negligence.—*Shaffer v. American Ry. Express Co.*, 282 S.W. 725.

As tending to prove negligence in injury to animals in unaccompanied live stock shipment, evidence of other shipment under like conditions, without injury, is admissible.—*Id.*

**App. 1927.** In action against railroad for damage to stock shipment, exclusion of shipping contract not signed by plaintiff *held* not error.—Dillen v. Wabash Rty. Co., 294 S.W. 439.

Evidence that shipper ordered car for 26 animals *held* admissible, in action for damage to shipment, where overloading of car was issue.—Id.

In action for damage to stock shipment, evidence of condition of stock after arrival at destination and before delivery to consignee *held* admissible.—Id.

**App. 1927.** Agreement by course of dealing as to time to be consumed on poultry shipment *held* inadmissible to prove carrier's liability for unreasonable delay under bill of lading providing for transportation with "reasonable despatch."—Parsons v. Chicago, B. & Q. R. Co., 300 S.W. 324.

#### 228 (4). Limitation of Liability.

**Sup. 1900.** In an action against a carrier, where stock is shipped under a special contract, evidence of the carrier's course of business and the rate charged other persons is only admissible to show the shipper's knowledge of the legal and special rates.—Paddock v. Missouri Pac. Ry. Co., 56 S.W. 453, 155 Mo. 524.

**App. 1894.** In an action against a carrier for loss of cattle shipped over its railroad, the bill of lading is admissible in evidence to show the limitations of defendant's liability it contains.—George v. Chicago, R. I. & P. Ry. Co., 57 Mo. App. 358.

#### 228 (5). Weight and sufficiency of evidence in general.

**Sup. 1884.** Where delay in the transportation of live stock occurred during excessively hot weather, and the attention of the trainmen was called more than once to the suffering condition of the animals, and no excuse is shown for the delay, the judgment for damages for injuries to the cattle will not be disturbed.—Ball v. Wabash, St. L. & P. Ry. Co., 83 Mo. 574.

**App. 1886.** In an action against a railroad company for failure to ship stock when requested, testimony by plaintiff that he thought he could have made a certain sum if he had been allowed to ship the stock was, in the absence of evidence as to the price of the stock at the place of shipment and the destination, insufficient on which to calculate

damages.—Birney v. Wabash, St. L. & P. Ry. Co., 20 Mo. App. 470.

**App. 1886.** In an action against a carrier for damages on account of injuries to live stock, evidence *held* sufficient to show that defendant was operating the railroad over which the shipment was made, and that it was notified of the loss in the manner and within the time stipulated in the contract.—Reynolds v. St. Louis, I. M. & S. Ry. Co., 22 Mo. App. 609.

**App. 1892.** In an action against a railway company for damages to stock transported by the company and injured during the transportation, evidence examined, and *held* to require the setting aside of a verdict against the company on the ground that the evidence clearly shows that the injury complained of was due to the shipper overloading the car.—Walton v. Kansas City, Ft. S. & M. Ry. Co., 49 Mo. App. 620.

**App. 1892.** Where, in an action against a carrier for negligence in the transportation of poultry, plaintiff gave evidence to show that it was shipped in good condition, properly cooped, in suitable weather, and that after a comparatively short run the carrier delivered the poultry with more than one-third of it dead, and the death rate was extraordinary and the cause of death was not shown; plaintiff had made out a *prima facie* case.—Hance v. Pacific Express Co., 48 Mo. App. 179.

**App. 1894.** Though a carrier is not an insurer of live stock shipments against danger arising from the natural propensities of vitality of the freight, and the shipper must show that the animal was injured by the carrier's negligence, evidence of the shipper that it was delivered apparently physically sound; that the loading, which the contract imposed on the shipper, was properly done, and the animal placed in a car by itself; that during the transit, which was only 30 miles, the train was repeatedly jerked with unnecessary violence; that on redelivery it had fresh abrasions, and was lame and stiff, and did not recover freedom of motion for several months,—is sufficient to show the injury was caused by the carrier's negligence.—Crow v. Chicago & A. R. Co., 57 Mo. App. 135.

**App. 1894.** In an action against a carrier of live stock for injuries to the stock resulting from their having been unloaded at the end of the line of the carrier as an initial carrier, and placed in stockyards infect-

ed with Texas fever, and kept there over night before the connecting carrier continued the transportation, evidence examined, and *held* to show that the stock was placed in the stockyards at the instigation of the officers of the connecting carrier, relieving the initial carrier of the damages resulting therefrom.—*Smith & Elliott v. Missouri, K. & T. Ry. Co.*, 58 Mo. App. 80.

**App. 1894.** Evidence of delivery to a carrier of a certain number of cattle, and of its delivery at destination of two less, with the value thereof, makes out a prima facie case for recovery by the shipper.—*George v. Chicago, R. I. & P. Ry. Co.*, 57 Mo. App. 358.

**App. 1895.** In an action for nonperformance of a contract to transport cattle, evidence examined, and *held* to show that no contract of through shipment was made, and that defendant delivered the stock at the destination given in a bill of lading in good order; and hence a demurrer to the evidence should have been sustained.—*Holloway v. Wabash R. Co.*, 62 Mo. App. 53.

**App. 1896.** In an action against a railroad company for breach of an alleged contract, whereby defendant agreed to furnish three cars, and to receive and ship therein plaintiff's stock at 1 p. m. on the 8th of March, plaintiff testified that on the 7th of March he told defendants' agent that he wanted to ship three cars of stock the next day, and that on the 8th of March he ordered three cars from defendant to ship cattle in, the order being made at 11 o'clock in the morning; and the station agent testified that on the morning of the 8th plaintiff inquired when a train could be had for him, and that, being told that a loaded train was due at 1:12, he said, "That will fix me." *Held*, that there was no evidence to sustain the alleged contract.—*Gann v. Chicago Great Western Ry. Co.*, 65 Mo. App. 670.

**App. 1896.** In an action against a carrier for loss to chickens shipped by plaintiff, in addition to proof of the delivery of the chickens in apparently healthy condition and that over one-third of them died during the transit, plaintiff showed by disinterested dealers and shippers of poultry that such a death rate was, under the circumstances, unprecedented, thus furnishing some evidence that the chickens must have been improperly or negligently handled by defendant. *Held* sufficient to support a recovery against defendant.—*Hance v. Pacific Express Co.*, 66 Mo. App. 486.

**App. 1899.** In an action for damages alleged to have resulted to plaintiff by reason of a failure to carry two cars of live stock with diligence, so that they arrived too late for the market of the day they should have arrived, the evidence, though conflicting, *held* sufficient to show that the delay was not attributable to storm.—*Eads v. Orcutt*, 79 Mo. App. 511.

**App. 1899.** In an action for injuries to live stock in transit, evidence, though circumstantial, *held* sufficient to authorize the jury to find that the stock was injured, not by its own inherent vices, but by the careless management of the car or train.—*Cash v. Wabash R. Co.*, 81 Mo. App. 109.

**App. 1899.** In an action for injuries to live stock shipped over defendant's road, where defendant claims that there was no evidence showing that a yardmaster had authority to bind it by assurances of a better run, on plaintiff objecting to going any further with his stock, there was sufficient prima facie evidence of his authority, it appearing that he was in charge of all trains at that point, and that plaintiff had shipped cattle over defendant's road prior to this, and knew this man to be the same who had always assumed authority over its trains, since it would have been an easy matter for defendant to show that the man was not the agent plaintiff claimed him to be, if such was the fact.—*Minter v. Chicago, R. I. & P. Ry. Co.*, 82 Mo. App. 130.

**App. 1901.** On an issue as to whether an agent or employé of a carrier closed the side doors of a box car containing a shipment of stock, while standing in its yards at Galesburg, Ill., thereby causing a loss from suffocation and overheating, it appeared that they were open for a space of two feet on either side, when examined at three different stations between Rock Island, the point of shipment, and Galesburg, and that they were open, too, when the latter place was reached and the car put on a siding, where it remained for 1½ hours, during which interval no one observed it, so far as disclosed. At the end of that time a person in charge of the shipment went to look at the stock, found the doors closed, opened one, and hot steam off the animals poured out. They were as wet, he said, "as if they had swam the river, and some of them were down." He said, also, that the doors were hard to move. Besides this, there was evidence tending to prove that the company had a rule that no one but em-



ployés were permitted in the yards. *Held* insufficient to authorize an inference that an employé shut the doors.—*Schureman v. Chicago, B. & Q. Ry. Co.*, 88 Mo. App. 183.

**App. 1903.** In an action for damages to a car load of hogs, caused by delay en route, *held*, that the evidence was sufficient to show that plaintiff's hogs were damaged by the delay.—*McCrary v. Missouri, K. & T. Ry. Co.*, 74 S.W. 2, 99 Mo. App. 518.

**App. 1903.** In an action to recover for the transportation of a jack, where damages for the death of the jack as a result of plaintiff's negligence was set up as a counterclaim, evidence showing that the jack was in good health when received by plaintiff; that plaintiff's route agent permitted the jack to remain down in the crate in which it was placed; that jacks, if allowed to remain down in a crate, become paralyzed in their legs, and will die if not soon relieved; and that the jack died the day of coming to its destination—was sufficient to show that plaintiff's negligence in permitting the jack to remain down directly contributed to its disease and death.—*Pacific Exp. Co. v. Emerson*, 74 S.W. 132, 101 Mo. App. 62.

**App. 1903.** In an action against an initial carrier for injury to cattle in transit, the evidence examined, and *held* to sufficiently disclose negligence.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.*, 75 S.W. 782, 100 Mo. App. 674.

**App. 1904.** Evidence that a delay in a shipment of stock was caused by a defective engine was sufficient to show negligence of the carrier though the train crew worked faithfully to put the engine in order.—*McCrary v. Chicago & A. Ry. Co.*, 83 S.W. 82, 109 Mo. App. 567.

**App. 1906.** In an action by a shipper for damages to live stock, the intervention of human agency, causing or concurring in causing the injuries, must be shown, but it may be established by circumstantial evidence.—*Griffin v. Wabash R. Co.*, 91 S.W. 1015, 115 Mo. App. 549.

**App. 1906.** Where the time ordinarily consumed in the entire transportation of stock between certain points was not more than six hours, evidence that 20 hours were consumed in such transportation was sufficient to sustain a finding of negligence on the part of the carrier, in the absence of proof explaining a portion of such delay.—*Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211.

**App. 1906.** Though mere delay is not evidence of negligence in transportation, where the fact of delay is supplemented by evidence of the cause, it may show that it was negligence.—*Wright v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 555, 118 Mo. App. 392.

**App. 1906.** In an action against a carrier for damages caused by delay in the transportation of cattle, evidence *held* sufficient to show that the delays were due to overloading of the train.—*Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644.

**App. 1908.** In an action for breach of contract to furnish cars, evidence considered, and *held* sufficient to show that plaintiff entered into the several verbal contracts with defendant's agent as declared on.—*Merlwether v. Quincy, O. & K. C. R. Co.*, 107 S.W. 434, 128 Mo. App. 647.

**App. 1908.** Evidence *held* to warrant a finding that one of plaintiff's horses that died, and the other two that became sick and depreciated in value, contracted their diseases as the result of the negligence of defendant carrier in failing to properly care for them during delay in transportation.—*Gilbert v. Chicago, R. I. & P. Ry. Co.*, 112 S.W. 1002, 132 Mo. App. 697.

Though evidence of mere delay is not sufficient to support an inference of the carrier's negligence, additional circumstances, though only slightly tending to show negligent origin of unusual delay, will support an inference of negligence.—*Id.*

**App. 1908.** Evidence *held* to show that animals were injured during transportation by each of two connecting carriers.—*Holland v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 61, 133 Mo. App. 694.

While delay in transportation of animals does not alone show negligence of the carrier, it becomes a probative force when connected with other evidence.—*Id.*

**App. 1908.** In an action for failure to furnish cars for plaintiff's shipment of live stock from a point in Texas, in which the ownership of the railroad at that point was in issue, evidence that a conductor on such road gave to a passenger at a point in Texas a receipt for fare purporting to be issued by defendant company was not alone sufficient to raise an inference of ownership in defendant.—*Brandom v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 540, 134 Mo. App. 89.

In an action against the Santa Fé Railroad Company for failure to furnish cars for

plaintiff's shipment of live stock from a point in Texas, folders of the Santa Fé System, showing affirmatively that the point was on the line of the Southern Kansas Railway Company, a distinct corporation, though a part of the Santa Fé System, did not tend to show ownership in the Santa Fé Company at such point.—*Id.*

**App.** To recover for a delay in the shipment of live stock, the shipper must prove that the delay was caused by the negligence of the carrier, and mere proof of delay will not support an inference of negligence.—(1909) *Clark v. St. Joseph & G. I. Ry. Co.*, 122 S.W. 318, 138 Mo. App. 424; (1912) *McDowell v. Missouri Pac. Ry. Co.*, 152 S.W. 435, 167 Mo. App. 576; (1913) *Hickey v. Chicago, B. & Q. R. Co.*, 160 S.W. 24, 174 Mo. App. 408; (1915) *Sikes v. St. Louis & S. F. R. Co.*, 176 S.W. 255, 190 Mo. App. 181; (1923) *Sinclair v. Missouri, K. & T. Ry. Co.*, 253 S.W. 380.

**App.** 1909. Where a carrier took 31 hours to transport stock which usually required but 8 or 10 hours, and the stock shrank and arrived too late to be placed on the market, which declined, one of the animals being so crippled as to be practically valueless, a prima facie case of negligence was made out.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276.

A shipper of stock must prove that an animal received by the carrier in good condition, and delivered at destination in an injured condition, received its injuries through some cause other than the animals' proper vice, but very slight proof of the negligence of the carrier is sufficient to require the carrier to show its freedom from negligence.—*Id.*

**App.** 1909. Evidence in an action against a carrier for injuries to a horse shipped on defendants' boat *held* to show that the horse when received by defendants was in good condition.—*Foust v. Lee*, 119 S.W. 505, 138 Mo. App. 722.

Where it is sought to enforce the common-law liability of a carrier for injuries to animals during shipment, a prima facie case of negligence arises from showing that the animals were wounded as by external violence during transit.—*Id.*

**App.** 1909. In an action for delay in shipping cattle, a finding for plaintiff for the loss from the decline in the market between the time his cattle should have arrived and did arrive could not be sustained, where he did not show at what price he sold the cattle, but only proved the highest market price on

the two dates, as neither the court nor jury may indulge in speculation or inference to supply an indispensable fact in the proof.—*Dawson v. Quincy, O. & K. C. R. Co.*, 122 S.W. 335, 138 Mo. App. 365.

Nor could plaintiff recover for loss occasioned by the stale appearance of the cattle caused by such negligent delay, where it was not shown that the cattle were rendered stale by the delay, or that plaintiff on that account was compelled to sell them for a less price than otherwise should have been received.—*Id.*

**App.** 1910. Proof of delay in a shipment of cattle accompanied by proof that the delays were caused by a shortage of coal and because of a sudden and extraordinary press of business, justified an inference of negligent delay, where the carrier knew, when it contracted for the shipment, of the conditions, and did not stipulate against delay on account thereof or notify the shipper of their existence.—*Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702.

**App.** 1910. In an action against a carrier for damages for delivering inferior cattle to plaintiff's consignee in place of those shipped by plaintiff, evidence *held* to sustain a finding that some of the cattle delivered to the consignee as plaintiff's were not shipped by him.—*Edwards v. Lee*, 126 S.W. 194, 147 Mo. App. 38.

**App.** 1910. In an action for damages to jacks resulting from contracting pneumonia, evidence *held* insufficient to show that the disease was contracted because of the negligent delay of the carrier or while the jacks were being transported.—*Gillespie v. Louisville & N. R. Co.*, 129 S.W. 277, 144 Mo. App. 508.

**App.** 1910. On October 5th, a shipper of cattle told the live stock agent of the carrier at the point of destination that he would require cars on the 15th, and the agent stated that it would be all right and another demand was made on the agent at the point of shipment of the 13th, to which he consented. Cars were not furnished until a month after such date and in an action for damages, the petition alleged that the delay of defendant—referring to the failure to deliver cars on the 15th—was an unreasonable delay. *Held*, that a contention that there was no evidence which could be considered of an unreasonable delay on the theory that no delay after the 15th could be considered was without merit. The failure of defendant's agents to complain of the time given and their acceptance of the

order justifying a conclusion that the time was reasonable.—*Baker v. St. Louis & S. F. R. Co.*, 129 S.W. 436, 145 Mo. App. 189.

**App.** Evidence *held* to show negligent delay in carrying live stock.—(1911) *Moss v. Missouri, K. & T. Ry. Co.*, 134 S.W. 1070, 153 Mo. App. 602; *Lay v. Chicago, B. & Q. R. Co.*, 138 S.W. 884, 157 Mo. App. 467; (1913) *Muir v. Missouri, K. & T. Ry. Co.*, 154 S.W. 877, 168 Mo. App. 542; *Wyatt v. Missouri Pac. Ry. Co.*, 158 S.W. 720, 173 Mo. App. 210; *Gregory v. Chicago, B. & Q. R. Co.*, 160 S.W. 830, 174 Mo. App. 550; (1919) *McMickle v. Wabash Ry. Co.*, 209 S.W. 611; (1920) *Gilbreath v. Atchison, T. & S. F. R. R.*, 217 S.W. 636; (1921) *Holland v. Hines*, 234 S.W. 366; (1922) *Miller v. Quincy, O. & K. C. R. Co.*, 240 S.W. 475.

**App.** In an action for injuries to stock in transit, evidence for plaintiff *held* sufficient to establish a prima facie case.—(1911) *McKinstry v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 1061, 153 Mo. App. 546; (1912) *Cunningham v. Wabash R. Co.*, 149 S.W. 1151, 167 Mo. App. 273.

**App.** 1911. Evidence *held* not to show that a connecting carrier of live stock was guilty of negligent delay in transporting the same.—*Otrich v. St. Louis, I. M. & S. Ry. Co.*, 134 S.W. 665, 154 Mo. App. 420, opinion adopted (1912) 144 S.W. 1199, 164 Mo. App. 444.

**App.** 1912. Proof of a few hours delay in the delivery of a shipment of live stock is not proof of the carrier's negligence, entitling the shipper to recover for delay.—*Ridgeway v. Missouri, K. & T. Ry. Co.*, 143 S.W. 532, 161 Mo. App. 260.

**App.** 1912. In an action for the death of hogs in a stock pen, evidence *held* to sustain a finding of a delivery to the railroad company.—*Reading v. Chicago, B. & Q. R. Co.*, 145 S.W. 1166, 165 Mo. App. 123.

**App.** 1913. In an action against a carrier for the injuries to a shipment of fat hogs, a delay of from 34 minutes to 2 hours in commencing transportation because a passenger train which the stock train ordinarily met at the point of shipment was late did not give rise to an inference of negligence.—*Winslow v. Chicago & A. R. Co.*, 157 S.W. 96, 170 Mo. App. 617.

**App.** 1913. Mere proof of unusual delay in transporting live stock will not authorize an inference of negligence by the carrier; but circumstances raising a fair inference of neg-

ligent delay are sufficient.—*Gregory v. Chicago, B. & Q. R. Co.*, 160 S.W. 830, 174 Mo. App. 550.

**App.** 1914. In an action against a carrier for damages caused by delay in a shipment of cattle, evidence *held* to show that such delay was not the proximate cause of the failure of the shipment to reach the market.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 341, 181 Mo. App. 142.

**App.** 1914. A delay of nearly double the usual time for a shipment of live stock for immediate sale establishes, under Rev. St. 1909, § 3121, as amended by Laws 1913, p. 177, a prima facie case of negligent delay.—*Riddler v. Missouri Pac. Ry. Co.*, 171 S.W. 632, 184 Mo. App. 709.

**App.** 1915. Evidence *held* to support a finding of loss to the shipper by shrinkage in the weight of cattle shipped, but insufficient to support recovery on account of a decline in market price.—*Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639.

Slight evidence of negligence is sufficient to support a finding that a carrier's delay in transportation of live stock was unreasonable.—*Id.*

**App.** 1915. Evidence merely that one of a shipment of cattle was injured, so it could not, for a week, stand up, and eight or ten others were bruised, and made no improvement for ten days, is insufficient as to the proper amount of damages.—*Ball v. Lusk*, 175 S.W. 238, 189 Mo. App. 297.

**App.** 1915. Evidence *held* insufficient to show that the loss in market value of cattle shipped arose solely because they got too much water when watered by plaintiffs at a station en route.—*Kent v. Chicago, B. & Q. R. Co.*, 176 S.W. 1105, 189 Mo. App. 424.

**App.** 1915. Verdict *held*, under evidence, not to award recovery for hogs dying after shipment had passed beyond defendant's line.—*Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746. See Carriers, 230(13) in this Digest.

**App.** 1915. In action against carrier of live stock for escape of stock from a pen, evidence *held* to justify a finding that the carrier knew that the stock would be placed in the pen, and that the pen was unsafe.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233, 191 Mo. App. 710.

**App.** 1915. In action against railroad for damage to shipment of mules in transit, evidence, both direct and inferential, *held* suffi-

cient to show causal connection between the road's negligent failure to sand the bottom of the car and the injury the mules did to themselves when thrown down, being incited to kick and bite.—*Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.*, 180 S.W. 412.

**App. 1915.** Evidence *held* to warrant inference that delay in transporting and unloading shipment of hogs after arrival at terminal was due to negligence and not to unusual flood of business.—*Smith v. Missouri Pac. Ry. Co.*, 183 S.W. 701.

**App. 1916.** Proof that plaintiff's shipment of cattle was delayed for some time at a division point and did not arrive at the destination until about ten hours later than the usual time will not, without anything else, establish negligent delay.—*Cunningham v. Chicago & A. R. Co.*, 182 S.W. 1033; *Bailey v. Same*, 182 S.W. 1034.

**App. 1916.** Evidence that a carrier's stock pen was muddy, that cattle were compelled to drink muddy water, had difficulty in getting sufficient water, and could be fed only by throwing the hay upon the ground, without showing injury, does not sustain an action against the carrier.—*Patterson v. Chicago & A. Ry. Co.*, 182 S.W. 1034.

**App. 1916.** Where horses were transported over two different lines of railroad, proof that, when received, they were injured, and that one of them died from such injury, will not support a joint judgment against both railroad companies.—*Jones v. Louisville & N. R. Co.*, 182 S.W. 1064.

**App. 1916.** Under Laws 1913, pp. 177, 178, delay in shipment of live stock *prima facie* establishes the carrier's negligence.—*Risler v. Missouri Pac. Ry. Co.*, 183 S.W. 676.

**App. 1916.** In suit for delay in shipment of cattle, letter from road's superintendent of freight loss admitting that a claim was filed concerning the shipment, treating matter as though notice had been given in proper time, *held* sufficient evidence of notice in due time.—*McFall v. St. Louis & S. F. R. Co.*, 185 S.W. 1157.

**App. 1916.** In action for damages for hogs condemned by government inspector, evidence that hogs were overheated in defendant carrier's pen before being loaded and shipped which failed to connect overheating with condemnation *held* insufficient to sustain verdict for plaintiff.—*McSpadden v. Lusk*, 186 S.W. 731.

**App. 1917.** In action for damage to stock shipment caused by carrier's delay, evidence *held* sufficient to render carrier liable for extraordinary shrinkage.—*Baker v. Bush*, 194 S.W. 1061.

**App. 1918.** Where shipper of live stock alleged that railroad company was guilty of negligent delay in transportation, shipper, while having burden of proving such negligent delay, need not establish it by direct evidence.—*Robinson v. Bush*, 200 S.W. 757, 199 Mo. App. 184.

**App. 1918.** Evidence *held* sufficient to support a finding that a steer shipped over defendant's road died through negligence of defendant.—*Akeman v. Wabash Ry. Co.*, 201 S.W. 590.

**App. 1919.** In an action by a shipper of fat cattle, where his shipment, which originated on a branch line, was held at a junction point for about two hours, evidence *held* insufficient to show that the delay was negligent.—*Berry v. Chicago & A. R. Co.*, 208 S.W. 622.

Where a shipment of stock is interstate, the state statute cannot be relied on to make a *prima facie* case of negligent delay; the matter being governed by the rules of decision in force in the federal courts.—*Id.*

In an action for damages for the death of fat steers, evidence *held* to warrant a finding that the steers died from being placed at a point in railroad yards, on a hot day, where they could not get air.—*Id.*

**App. 1919.** In action against railroad for having failed to transport a stallion as required by a Kansas statute which called for a speed of 15 miles an hour exclusive of particular stops and causes mentioned, evidence *held* to justify finding that transportation was not effected as expeditiously as required, and that, after acceptance of stallion for shipment, the railroad was not prevented from transporting expeditiously by unavoidable accidents or snow conditions.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S.W. 404.

Evidence *held* to sustain finding that delay and slowness of transportation after stallion was accepted for shipment caused and enabled a slight cold it contracted to develop into pneumonia which caused its death.—*Id.*

In an action against a railroad for death of a stallion caused by failure to transport as expeditiously as required by a Kansas statute, slight evidence is sufficient to maintain the

shipper's burden of proof as to the cause of death to make a case for the jury.—*Id.*

**App. 1920.** In action for breach of shipment contract requiring shipper to deliver to carrier's freight claim agent within 10 days of time live stock is removed from cars any claim for damages, testimony that written claim was made and sent to the freight agent within such time, that he acknowledged receipt of the same, and that the documents had been lost, furnished sufficient *prima facie* proof.—*Thee v. Wabash Ry. Co.*, 217 S.W. 568.

**App. 1920.** In an action for damages to a shipment of live stock because of rough handling and severe weather, evidence *held* to support finding that the carrier was negligent.—*Cravens v. Hines*, 218 S.W. 912.

**App. 1920.** In an action for damages for delay of a shipment of hogs, where the cause of the delay and the facts surrounding it were wholly within the carrier's knowledge, plaintiffs needed to prove defendant's negligence only by circumstances necessary to raise a slight inference of negligence on defendant's part.—*Baker v. Schaff*, 221 S.W. 743.

**App. 1920.** While one suing for damages for alleged negligent delay of an interstate shipment of sheep is required to not only show a delay, but also that the same was negligent, a delay shown under such circumstances as to raise even a slight inference of negligence is sufficient.—*Moore v. Chicago, B. & Q. R. Co.*, 223 S.W. 1079.

In an action for damages for delay in interstate shipment of sheep, evidence on the part of the plaintiff *held* sufficient to sustain the burden upon him to show some negligence on the part of the carrier in addition to delay.—*Id.*

**App. 1921.** Evidence *held* insufficient to establish *prima facie* negligent delay in shipment of cattle.—*Neeley v. Hines*, 227 S.W. 650, 206 Mo. App. 621.

**App. 1921.** In an action for damages due to delay in delivering a shipment of cattle from a point in Missouri to a point in Illinois, mere proof of delay will not establish *prima facie* the negligence of the carrier, for Rev. St. 1919, §§ 9926, 10449, as to *prima facie* proof of negligence, are inapplicable; the shipment being interstate, so that the liability of the carrier is governed by the rules of decision in force in the federal courts.—*Bland v. Chicago & A. R. Co.*, 232 S.W. 232.

**App. 1921.** In an action for injuries to a stallion from burns while in a palace horse

car, evidence *held* sufficient to warrant a finding that defendant violently jolted or jarred the car and caused a lantern to fall therein and started the fire.—*Ray v. Wabash Ry. Co.*, 232 S.W. 268.

In an action for damages to plaintiff's stallion from burns while in a palace horse car in freightyards, evidence *held* sufficient to warrant finding by the jury that the jarring and jolting of the car which caused the fire was caused by the car being struck by an engine and that such striking was an act of negligence.—*Id.*

**App. 1921.** While it may be that, in an interstate case, a cause of action can be stated in the petition for loss of live stock based merely on the carrier's common-law liability, this merely enables plaintiff to make a *prima facie* case without affirmatively showing how the shipment was damaged, and when the evidence is all in, if there is no presumption against the carrier or it is manifest that the loss was not influenced, affected, or brought about by any failure of the carrier to perform its duty, there can be no liability.—*Bragg v. Payne*, 235 S.W. 148.

**App. 1922.** In action for delay in an interstate shipment of hogs, mere proof of delay was not sufficient to make out a *prima facie* case, but it was necessary to prove some negligence in connection with the delay.—*Howell v. Davis*, 236 S.W. 889.

Where delay in transportation of an interstate shipment of hogs occurred when shippers were not on the train, so that the causes of the delays were within the carrier's exclusive knowledge, the shippers could establish a *prima facie* case of negligence by proof of circumstances raising a slight inference of negligence.—*Id.*

**App. 1922.** In action for negligent delay in transporting a shipment of live stock, where the shipper was not present at the point where the delay occurred, and the cause of the delay and the facts surrounding it were wholly within the carrier's knowledge, the shipper was required to prove negligence only by showing facts and circumstances sufficient to raise a reasonable inference of negligence on the part of the carrier.—*Neely v. Hines*, 237 S.W. 906.

In an action for negligent delay in transporting live stock, facts and circumstances as shown in plaintiff's evidence *held* to create a situation from which an inference of negligence on the carrier's part reasonably could be drawn.—*Id.*

**App. 1922.** In an action for damages from delay in an interstate shipment of live stock, resulting in shrinkage and loss from a declining market, it is not sufficient for plaintiffs to make out a case of mere delay, but the burden is on them to prove negligent delay; and where the causes of the delay and facts surrounding them are wholly within the defendant's knowledge, plaintiffs need to prove defendant's negligence only by circumstances raising a slight inference of negligence.—*Harrison v. Chicago & A. R. Co.*, 239 S.W. 871, 209 Mo. App. 526.

In an action for damages from delay in shipment of live stock, evidence showing several unusual and unexplained train delays at different points *held* sufficient to make out a prima facie case of negligence; the causes of delay being peculiarly within the carrier's knowledge.—*Id.*

**App. 1922.** In an action for negligent failure to deliver a shipment of cattle to the consignee as per contract, evidence *held* to justify a finding that defendant's agent was correctly instructed as to the name of the consignee, and that all elements necessary for a binding verbal contract existed.—*Montgomery v. Davis*, 240 S.W. 282, 209 Mo. App. 698.

**App. 1922.** That there was a delay of 10 or 12 hours in transit, and that on arrival 8 of the shipment of 87 hogs were dead, and that this was an unusual number, *held* not enough, without more, to show that they died because of the delay or because of negligent handling of the car.—*Cloyd v. Wabash Ry. Co.*, 240 S.W. 885.

**App. 1922.** In an action for death of a hog in transit, evidence *held* sufficient from which the jury might have inferred negligence on part of the carrier in properly caring for it.—*Browning v. Wells Fargo & Co. Express*, 243 S.W. 190.

**App. 1922.** A shipper's prima facie case for loss of hogs in transit made by proof of delivery to a carrier in good condition and death of some of them when delivered by the carrier was not overcome by evidence that they died from congestion of the lungs; it not appearing that was the sole cause of death.—*Hartford Fire Ins. Co. v. Payne*, 243 S.W. 357, certiorari quashed (1923) *State ex rel. Hartford Fire Ins. Co. v. Trimble*, 250 S.W. 393, 298 Mo. 418.

**App. 1923.** Where a shipper, suing for damages for alleged negligent delay in an interstate shipment of cattle, failed to show

affirmatively that the delay was caused by any negligence of defendant, but contented himself with showing that there was a delay caused by the bursting of a flue pipe of the engine, which had been examined before it left the roundhouse, the evidence did not warrant a verdict for plaintiff, the burden of proving negligence being a matter of substance and resting on plaintiff.—*Mason v. Chicago & A. R. Co.*, 247 S.W. 243.

**App. 1923.** In action for negligent delay in shipment of a carload of cattle, evidence of a market report showing that heifers of similar kind to those shipped sold at \$11.50 and \$12 per hundredweight on December 16, and that the cattle shipped by plaintiffs sold the next day for \$11, was evidence of a decline in the market.—*Marsh v. Davis*, 251 S.W. 390.

**App. 1923.** In shipper's action against railroad for refusal to accept cattle on certain date pursuant to agreement, requiring shipper to drive cattle back to the farm in a snowstorm, evidence *held* insufficient to show the railroad was negligent in not notifying shipper, before he left home with the cattle, that they would not be received because of snowstorm making transportation impossible.—*Crowdis v. Quincy, O. & K. C. R. Co.*, 255 S.W. 347.

In shipper's action against railroad for delay in shipment for cattle following refusal to accept cattle on a certain date pursuant to agreement to accept them on such date for shipment into other state, because of snowstorm making it appear that cattle could not be transported on such date, evidence *held* insufficient to show the railroad was guilty of negligence in refusing to accept cattle on such date.—*Id.*

**App. 1924.** Verdict for plaintiff, in action for damages caused by negligent delay in transporting hogs, which might have contracted disease which caused damage, as result of conditions other than delay, *held* based solely on conjecture.—*Argenbright v. St. Louis & S. F. Ry. Co.*, 267 S.W. 74, 218 Mo. App. 633.

**App. 1924.** Evidence *held* insufficient to show ultimate delay at destination of shipment of live stock, or that such ultimate delay was negligent.—*Sandker v. Wabash Ry. Co.*, 267 S.W. 957; *Phillippi v. Same*, 267 S.W. 960.

**App. 1925.** Jury's calculation as to damages from shrinkage of cattle *held* justified

by evidence.—*Nigh v. Chicago, R. I. & P. Ry. Co.*, 276 S.W. 1038, 220 Mo. App. 760.

**App.** Proof of delivery of live stock to carrier in good condition and carrier's delivery in bad condition makes *prima facie* case.—(1926) *Griggs v. St. Louis & H. R. Co.*, 285 S.W. 159; (1927) *Morrow v. Wabash Ry. Co.*, 280 S.W. 343; *Dillen v. Wabash Ry. Co.*, 204 S.W. 439.

**App.** 1926. Petition charging that carrier failed to deliver part of shipment of hogs *held* not sustained by proof that plaintiff's shipment had become interchanged with smaller shipment, which was sold as his.—*Carr v. St. Louis-San Francisco Ry. Co.*, 284 S.W. 184.

**App.** 1929. Slight circumstances suffice to show that delay in shipment of cattle was caused by carrier's negligence, but mere proof of unusual delay is insufficient to show negligence.—*Crowell v. St. Louis-San Francisco Ry. Co.*, 11 S.W.(2d) 1055.

#### 228 (6). Limitation of Liability.

**App.** 1885. Where a contract for the shipment of live stock provided that no claim for loss or damage should be allowed unless written notice, verified by affidavit, should be given to the general freight agent within five days after the removal of the stock from the cars, evidence that the shipper saw a certain person with reference to a loss, and was told by him to sell the animals and make out a claim, which would be paid, if the carrier was at fault, was insufficient to show a waiver of the terms of the contract, in the absence of any evidence that the person seen was a general freight agent or had any power to bind the carrier.—*Brown v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 568.

**App.** 1904. In an action for injuries to beef cattle by delay in transit, evidence that they were valued at \$50 a head at M., and sold at an average of \$52.03 at East St. Louis, was insufficient to show that the cattle were undervalued, by reason of which a lower freight rate was secured than plaintiff would otherwise have been compelled to pay.—*Rice v. Wabash R. Co.*, 80 S.W. 974, 106 Mo. App. 371.

**App.** 1905. In an action against a carrier for damages to a shipment of live stock, evidence considered, and *held* not to show that a reduced charge for carriage was agreed to as consideration for a stipulation liquidating damages, in case of injury.—*Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co.*, 87 S.W. 553, 113 Mo. App. 144.

A recital in a bill of lading that the shipment was carried at a special rate, in consideration of a stipulation liquidating damages in case of injury, was insufficient alone to show a carriage at a reduced rate.—*Id.*

**App.** 1906. In an action against a carrier for delay in transporting cattle, evidence *held* to show that plaintiff made a claim for damages within 10 days after the unloading of the stock.—*Rathiff v. Quincy, O. & K. C. R. Co.*, 94 S.W. 1005, 118 Mo. App. 644.

**App.** 1908. Where the contract of shipment recites that a named rate is a reduced rate in consideration of an agreed valuation of the freight in the event of loss, it will be accepted *prima facie* as stated.—*Hancock v. Chicago & A. Ry. Co.*, 111 S.W. 519, 131 Mo. App. 401.

**App.** 1910. Weight of the evidence in an action on a live stock shipment contract *held* to show that the carrier had more than one rate in force, as bearing on the question of consideration for a contract limiting liability.—*McElvain v. St. Louis & S. F. R. Co.*, 131 S.W. 736, 151 Mo. App. 126.

**App.** 1915. While owing to the limitations on its liability, negligence of a carrier of live stock must be shown, it may be established by circumstantial evidence.—*Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746, 191 Mo. App. 676.

Evidence *held* to warrant a finding that a carrier of hogs was negligent.—*Id.*

**App.** 1915. In an action for injuries to a shipment of mules, evidence *held* sufficient to support a verdict for plaintiff on the theory that he gave the written notice of injury required by his contract with defendant railroad through the latter's agent noting down the injuries upon oral notice thereof and reporting them.—*McElvain v. St. Louis & S. F. R. Co.*, 180 S.W. 1018.

**App.** 1922. In an action for damages to an interstate shipment of horses, evidence *held* sufficient to justify the court's finding that the shipment was understood and intended to be a through shipment, so that the initial carrier was liable under the Carmack Amendment (49 USCA § 20) for damage caused by its own or any connecting carrier's negligence.—*Whiteside v. Chicago, M. & St. P. Ry. Co.*, 239 S.W. 150.

**App.** 1928. Evidence, as to express charged on horses *held* to support judgment

for actual value of injured horse (Hepburn Act, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Hunter v. American Ry. Express Co.*, 4 S.W.(2d) 847.

Evidence that plaintiff's employee signed shipping contract as attendant with his knowledge *held* not sufficient to limit recovery to released value therein (Hepburn Act, as amended by Act March 4, 1915, and Act Aug. 9, 1916 [49 USCA § 20]).—*Id.*

### —229. — Damages.

Instructions, see post, —230.

#### —229(1). Elements of damage.

**App. 1895.** In an action under Rev. St. 1889, § 2590, for damages for injuries to hogs by reason of failure to have trap doors in the car in which they were shipped, the petition need not make claim for the attorney's fee allowed by the statute, since the costs follow the judgment.—*Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

**App. 1898.** The cost of doctoring and feeding an injured car load of horses, so as to get them into marketable condition after reaching their destination, is a proper element to be considered in determining the amount of damages.—*Matney v. Chicago, R. I. & P. Ry. Co.*, 75 Mo. App. 233.

**App. 1901.** In an action against a carrier for negligent delay in the transportation of cattle, where the evidence showed that the market did not close until 3 o'clock of the day of the arrival of the cattle, and the cattle were at the market at 12 o'clock of that day, the jury, in considering the question of damages, on the ground of loss on the cattle by difference in market price or market value, should only take into consideration the market price of the cattle on their arrival at the market, and their price at the time they should have arrived there if there had been no delay in transportation.—*Perry v. Chicago, R. I. & P. Ry. Co.*, 89 Mo. App. 49.

**App. 1904.** In an action against a railroad company for delaying a shipment of cattle, it appeared that the cattle were "feeders" bought for resale; and plaintiff, who was an experienced cattleman, testified that when they arrived they looked gaunt, had lost 30 or 35 pounds more in weight than they would have, had they not been delayed, and were not in a salable condition when they arrived, as they had been when they were shipped. *Held*, that the damages were not so uncertain and speculative as to be impossible of ascer-

tainment.—*Hendrix v. Wabash R. Co.*, 80 S. W. 970, 107 Mo. App. 127.

Where cattle shipped by plaintiff were delayed by negligence of defendant, the expense incurred by plaintiff in furnishing extra feed is a part of his damages.—*Id.*

**App. 1909.** A shipper of cattle is entitled to recover compensation for the actual loss on account of the negligent delay of the carrier, which loss may consist of depreciation in market value, of loss in weight, and of loss on account of the stale appearance of the animals.—*Dawson v. Quincy, O. & K. C. R. Co.*, 122 S.W. 335, 138 Mo. App. 365.

**App. 1910.** Where a carrier, being unable to carry the shipment of live stock because of a wreck on its road resulting from its negligence, returned the stock to the shipper, and he employed another carrier to take the shipment to its destination with reasonable expedition, the defaulting carrier is liable for actual loss, such as shrinkage in weight of the animals, decline in the market, and expense incurred on account of the re-shipment.—*Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S.W. 1185, 141 Mo. App. 453.

**App. 1910.** In an action for damages for delay in furnishing cars and transporting a shipment of cattle, the shrinkage of the cattle because of such delays and the falling off of the market price in the meantime were properly considered in estimating damages sustained.—*De Lisle v. St. Louis & S. F. R. Co.*, 129 S.W. 252, 149 Mo. App. 8.

**App. 1913.** In an action against a carrier for breach of a contract to furnish a stock car for plaintiff's mules, plaintiff *held* only entitled to recover for any expense incurred in driving the mules from the station back to the farm from which they had been driven for loading, and any depreciation of value incident to such drive.—*Howell v. St. Louis & H. Ry. Co.*, 153 S.W. 578, 171 Mo. App. 92.

**App. 1915.** Interest *held* not recoverable before judgment, where the action was ex delicto against a carrier for injuries to hogs awaiting shipment.—*Reading v. Chicago, B. & Q. R. Co.*, 173 S.W. 451, 188 Mo. App. 41.

**App. 1915.** Where live stock is lost by escaping from a defective railroad pen, interest on value of stock lost from date of the filing of suit is recoverable.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233, 191 Mo. App. 710.



**App. 1920.** Where the shipper of live stock in interstate commerce, under 45 US CA § 71, requested extension of time of confinement from 28 to 36 hours, and the carrier agreed, a lawful contract resulted which gave rise to a cause of action in the shipper if violated by the carrier, with resulting damages through unloading the cattle too early at disease-infected yards midway in the transit.—*Bradford v. McAdoo*, 219 S. W. 92, 202 Mo. App. 412.

**App. 1921.** If railroad negligently delayed shipment of cattle, the damage to the cattle sustained by reason of being placed in the sun and in a badly ventilated place in railroad yard while waiting to be moved would be recoverable as an item of the damages, regardless of whether the railroad was negligent in the placing of the cattle at such particular place in its yards.—*Neeley v. Hines*, 227 S.W. 650, 206 Mo. App. 621.

**App. 1923.** While contract of shipment of stock obligated plaintiff to pay feed bill at unloading station, such a provision would not prevent the plaintiff from recovering the amount of feed bill paid by him, which became due as the result of carrier's negligence, and which arose by reason thereof, on the theory that the carrier could not contract against the result of its own negligence.—*Johnson v. Wabash Ry. Co.*, 251 S.W. 719.

#### 229 (2). Measure of damages in general.

**Sup. 1877.** Where, in an action against a carrier for delay in transporting hogs, it appeared that there was an unusual shrinkage, plaintiff was entitled to recover the difference between the usual shrinkage and that which actually happened.—*Sturgeon v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 509.

**Sup. 1879.** In a suit against a carrier for delaying a shipment of live stock, the measure of damages was the difference in market price when the stock did arrive and the price when they would have arrived, but for the delay, and the difference between the actual and the usual shrinkage; and evidence of the price when they were sold should have been admitted.—*Glascock v. Chicago & A. R. Co.*, 69 Mo. 589.

**App. 1886.** In an action against a railroad company for damages for failure to ship stock, the measure of damage is the difference between the market value of the property at the destination to which it was to be carried at the time it would have arrived

there and its value at the same time at the place from which it was to have been carried.—*Birney v. Wabash, St. L. & P. Ry. Co.*, 20 Mo. App. 470.

**App. 1886.** In an action against a railroad for failing to have cars ready to receive a shipment of cattle at the time agreed, the measure of damages is the difference between their market value at their destination at the time they should have arrived and their value at the same time at the point of shipment.—*Gelvin v. Kansas City, St. J. & C. B. Ry. Co.*, 21 Mo. App. 273.

**App. 1895.** Where the cattle market declined during a delay in shipment of cattle over defendant's railroad, defendant is not liable for damages for the loss caused by such decline.—*Vaughn v. Wabash Ry. Co.*, 62 Mo. App. 461.

**App. 1896.** Damage resulting to the shipper of live stock, occasioned by the failure of the carrier to receive and transport it, is the difference in price of the stock when it ought to have been delivered and when it was actually delivered at the place of destination, unless it is shown that the shipper might have procured transportation over another road.—*Wilson v. Missouri Pac. Ry. Co.*, 66 Mo. App. 388.

**App. 1897.** A carrier of live stock, failing to deliver stock received by it for transportation on the day it should have been delivered, is liable for interest on the value of the property from the day it should have been delivered.—*Lachner v. Adams Express Co.*, 72 Mo. App. 13.

Where live stock dies during transportation because of the negligence of the carrier, the measure of damages is the value of the property at the place of destination, less the agreed charge for carriage, where there is a market value of the property; and, where there is no market value, proof of the value of the property may be fixed by witnesses.—*Id.*

**App. 1897.** Where a carrier violates its contract to ship live stock at a certain time, the measure of damages against the carrier is the difference in the market price at the place of destination, between the time when the shipment should have reached such destination had the shipment been made according to the terms of the contract and the time when it did reach such destination, together with the damages sustained by reason of any shrinkage in the weight of the stock

and physical injury occasioned by reason of the nonshipment at the time specified in the contract.—*Gann v. Chicago Great Western Ry. Co.*, 72 Mo. App. 34.

**App. 1900.** Where a carrier, transporting cattle, negligently permitted them to be delayed, whereby they arrived at a time of day when the market was closed and the shipper was compelled to hold them over, the measure of damages was the difference in the reasonable market value of the cattle in that market on the day when the cattle arrived and the reasonable market value of cattle on the next day.—*Glasscock v. Chicago, R. I. & P. Ry. Co.*, 86 Mo. App. 114.

**App.** In an action for damages caused by delay in transporting cattle the difference in the market value of the cattle at the place of destination, at the time they should have arrived, and the time they did arrive, is the measure of damages.—(1902) *Sloop v. Wabash R. Co.*, 67 S.W. 956, 93 Mo. App. 605; (1910) *Bennett v. Chicago, R. I. & P. Ry. Co.*, 131 S.W. 770, 151 Mo. App. 293; (1913) *Muir v. Missouri, K. & T. Ry. Co.*, 154 S.W. 877, 168 Mo. App. 542.

**App. 1904.** In an action against a railroad company for delay in shipping cattle, plaintiff was entitled to recover what he paid for extra feed because of the delay, and the difference between the value of the cattle in the condition they were in when delivered, and the condition they would have been in had the delay not occurred.—*Hendrix v. Wabash R. Co.*, 80 S.W. 970, 107 Mo. App. 127.

**App. 1910.** In an action against a carrier for damages by delivering inferior cattle to plaintiff's consignee in place of those shipped by plaintiff, the measure of damages was the difference in the market value per hundredweight or head at destination between the cattle shipped and those delivered as plaintiff's.—*Edwards v. Lee*, 126 S.W. 194, 147 Mo. App. 38.

**App. 1922.** The measure of damages to cattle injured in an interstate shipment, as to which Act Cong. March 4, 1915 (38 Stat. 1197), makes the carrier liable for the "full actual loss" sustained, is the difference in their market value in the condition in which they arrived at their destination and their value had they arrived in good condition.—*Carpenter v. Hines*, 239 S.W. 593.

**App. 1924.** Measure of damages resulting from delay in shipment and applicable for damages resulting from unreasonable de-

lay in furnishing stock cars, as provided by R. S. 1919, § 9925, as amended by Laws 1921, p. 268, is the difference in the market price at the place of destination when the shipment should have arrived and when it did arrive, plus the expense incurred because of the delay.—*Morrison v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 449.

**App. 1924.** Difference between market value at point of delivery, of animals injured during shipment, and their value when delivered to carrier, is not proper measure of damages, and evidence of market value before injury is inadmissible.—*Morrow v. Wabash Ry. Co.*, 265 S.W. 851, 219 Mo. App. 62.

Measure of damages for injury to animals during transportation is difference between value at point of destination in damaged condition and value if uninjured.—*Id.*

Where injured animals never reached destination intended, measure of damages for their injury was difference between their value in damaged condition where delivered and what their value would have been if delivered at time and place originally contemplated, less any unpaid freight.—*Id.*

Where mules consigned to New Orleans were injured and unloaded at East St. Louis and kept there for several weeks to recondition, and then reshipped to New Orleans, measure of damages for their injury was difference between value when they should have been delivered and when actually delivered, plus cost of reconditioning and expense of re-shipment, less any unpaid freight.—*Id.*

**App. 1924.** The measure of damages to live stock from negligent delay in transporting is the difference between the fair market value of the cattle at destination and time of arrival, in the condition in which they did arrive, and their value had they arrived in good condition.—*Sandker v. Wabash Ry. Co.*, 267 S.W. 957; *Phillippi v. Same*, 267 S.W. 960.

**App. 1925.** Measure of damages for delay in furnishing stock cars stated.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 99, 218 Mo. App. 314; *Williams v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 935, 217 Mo. App. 662.

**App. 1925.** Shipper of animals held entitled to difference between market value of entire shipment at destination in good condition and sale price at way point, though only part of animals were injured.—*Morrow v.*

Wabash Ry. Co., 276 S.W. 1030, 220 Mo. App. 518.

229 (3). **Special damage dependent on knowledge of circumstances.**

See explanation, page iii.

229 (4). **Connecting carriers.**

**App. 1908.** Where a carrier contracted with plaintiff to carry hogs to Kansas City and deliver them to a connecting carrier for shipment to a commission company at another point, and the carrier unloaded the hogs at Kansas City where they had to be sold because of a stock quarantine which prevented their reshipment after being unloaded, plaintiff was damaged by the breach of the contract unless he realized as much by the sale in Kansas City as he would have realized from the expected sale at destination, notwithstanding the prospective buyer had agreed not to claim damages because of the nondelivery of the hogs.—Wilson v. St. Louis & S. F. R. Co., 108 S.W. 612, 129 Mo. App. 347.

229 (5). **Amount awarded.**

**App. 1888.** In an action against a carrier for injury to chickens, an averment in the petition that the injury complained of was the result of the car in which the chickens were loaded being violently thrown against another car in Kansas City, did not confine plaintiff, in the damages recoverable to the chickens actually killed in Kansas City, or preclude him from recovering for those which died on the road to their destination as a result of the collision.—Kain v. Kansas City, St. J. & C. B. R. Co., 29 Mo. App. 53.

**App. 1903.** In an action against a carrier for delay in a shipment of live stock, the court instructed that the measure of damages was the difference between the market price when the cattle arrived at their destination and that when they should have arrived, and the difference between the shrinkage of weight actually sustained and that which would have taken place had there been no delay. The weight of the cattle was not shown. All that appeared was the amount of shrinkage, which, at the price the cattle brought, would have made the amount of that item of damages \$28. *Held*, that a verdict of \$100 was conjectural and excessive.—Helm v. Missouri Pac. R. Co., 72 S.W. 148, 98 Mo. App. 419.

**App. 1915.** In an action against a railroad for damages to five carloads of mules in transit through defendant's failure to sand the floor of the cars, so that the mules were

thrown down repeatedly and incited to kick and bite, verdict for \$900 *held* not excessive.—Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co., 180 S.W. 412.

**App. 1920.** Where plaintiff shipper of live stock shows that the value of the injured cow was \$60 when received by defendant railroad, and proves an expenditure of \$2 for care of the cow prior to its death after its arrival at destination, verdict for plaintiff shipper against defendant railroad for \$65 is excessive by \$3.—Byrum v. Chicago & A. R. Co., 226 S.W. 91.

**App. 1921.** In an action against a railroad company for damages for the conversion of a shipment of 218 breeding ewes, which as a result was sold for slaughter, the award of \$2,125 *held*, under the evidence, not excessive.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo. App. 161.

**App. 1924.** A verdict for \$800 against an express company for loss of a jack killed in transit *held* not excessive, in view of testimony that it was reasonably worth from \$1,000 to \$1,300 at the place of destination.—Ward v. American Ry. Express Co., 259 S.W. 514.

**App. 1926.** Judgment for shippers *held* excessive to amount of claim for extra feed, where there was no evidence of its reasonableness.—Mourer v. Wabash Ry. Co., 280 S.W. 1050.

230. — **Trial.**

See ante, 206.

230 (1). **Questions for jury in general.**

**Sup. 1923.** Evidence that shipper of hogs ordered on November 12 three stock cars, to be delivered for loading on November 18, *held* ample for submission of that issue to jury.—Howell v. Hines, 249 S.W. 924, 298 Mo. 282.

**App. 1893.** In an action against a carrier for breach of contract for the shipment of stock, *held*, under the evidence, that the issue as to the authority of defendant's local agent to make the contract in question should have been submitted to the jury.—Handley v. Chicago, R. I. & P. Ry. Co., 55 Mo. App. 499.

**App. 1895.** In an action for damages for breach of a verbal contract to furnish cars and receive and ship cattle on a certain day, the question whether the plaintiff proved the verbal contract was an issue of fact to be sub-

mitted to the jury under the evidence and instructions, and hence a demurrer to the evidence was properly overruled.—*Miller v. Chicago & A. Ry. Co.*, 62 Mo. App. 252.

In an action for damages for breach of a verbal contract to furnish cars and receive and ship cattle on a certain day, evidence as to the making of the contract examined, and *held* sufficient to go to the jury.—*Id.*

**App. 1908.** In an action for failure to furnish cars for plaintiff's shipment of live stock, evidence *held* insufficient to carry to the jury the question of defendant's ownership of the road at the point of shipment.—*Brandom v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 540, 134 Mo. App. 89.

In an action against a carrier for failure to furnish cars for plaintiff's shipment of live stock, if the ownership of the railroad is not disputed, meager evidence of ownership will suffice to carry that question to the jury; but if the fact is disputed, plaintiff must furnish competent evidence of sufficient evidentiary strength to raise a debatable issue.—*Id.*

**App. 1915.** In an action for damages to a shipment of live stock, evidence that plaintiff did not knowingly sign an agreement releasing certain damages and imposing other burdens, which barred any recovery, *held* insufficient to go to the jury.—*Cox v. St. Louis & S. F. R. Co.*, 174 S.W. 127, 188 Mo. App. 515.

**App. 1915.** Whether a conversion by carrier of shipment of horses was waived by the shipper, depending on knowledge and intention, *held*, on evidence not conclusive, a question for the jury.—*People's State Savings Bank v. Missouri, K. & T. Ry. Co.*, 178 S.W. 292, 192 Mo. App. 614.

**App. 1916.** Evidence in suit for damages for carrier's negligence in transportation of cattle *held* to raise a question for the jury.—*Greening v. Chicago & N. W. Ry. Co.*, 183 S.W. 1121.

**App. 1921.** Where an owner of breeding ewes, which had been delivered by carrier to the wrong yards, where they were slaughtered, accepted the proceeds of their sale, he did not waive as a matter of law his right of action against the carrier which made the misdelivery, but the question should be submitted to the jury.—*McNeill v. Wabash Ry. Co.*, 231 S.W. 649, 207 Mo. App. 161.

**App. 1921.** Plaintiff, suing for death of hogs in transit, alleging as cause negligent failure to furnish clean cars, *held*, by evi-

dence as to condition of hogs when delivered to carrier, weather conditions, amount of dust and filth in car, and testimony of veterinarian as to what effect such an amount would have on hogs in a car, to make out a case for the jury.—*Rhodes v. Missouri Pac. R. Co.*, 234 S.W. 1026.

**App. 1922.** In an action for negligence in failing to furnish a stock car within a reasonable time after notice, evidence that car was not furnished until three days after notice *held* insufficient to take the case to the jury, in absence of evidence that a car could have been obtained earlier, and in the absence of a showing as to the particular facts and circumstances making such three-day delay negligence, in view of Rev. St. 1919, §§ 9913, 10447.—*Howell v. Hines*, 236 S.W. 886.

**App. 1923.** In an action against a railroad for injuries to horses sustained when they became prostrate because of legs protruding out of door, and were injured by other horses in same shipment, question whether injuries were caused by a defective door of the car, as claimed by shipper, or by the vicious propensities of the horses, as claimed by the railroad, *held* for jury.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

**App. 1924.** In an action by shipper against railroad company, under Rev. St. 1919, § 9925, as amended by Laws 1921, p. 268, for failure to furnish stock cars without unreasonable delay, where cars were not furnished for over a month after being ordered, the defense being that defendant's service and equipment had been impaired about 25 per cent. by strike, in absence of stipulation relating to delay from the strike, the question of defendant's liability was for the jury.—*Morrison v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 449.

**App. 1924.** In action for unreasonable delay in furnishing cars for loading of cattle, whether delay of 30 days in furnishing cars was an "unreasonable delay" which is defined in Sess. Acts 1921, p. 268, as any delay exceeding 24 hours from date cars are required to be furnished shipper for shipping of live stock, and in view of prior car orders which carrier was required to fill first, under Rev. St. 1919, § 9985, *held* for jury.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

**App. 1925.** Carrier's evidence in action for damages to animals in transit *held* not to require that demurrer to evidence be sustained.—*Morrow v. Wabash Ry. Co.*, 276 S.W. 1030, 220 Mo. App. 518.

**App. 1926.** Whether delivery of shipment of hogs by carrier to commission company was made by placing them in unloading chute controlled by stockyards company *held* question for jury.—*Carr v. St. Louis-San Francisco Ry. Co.*, 284 S.W. 184.

**App. 1927.** Whether shipper of cattle to Chicago was entitled to benefit of Kansas City market *held* for jury, in view of ambiguity in contract and evidence in explanation thereof.—*Bailey v. St. Louis & S. F. Ry. Co.*, 290 S.W. 630.

**App. 1927.** In action against railroad for damage to stock shipment, case *held* for jury.—*Dillen v. Wabash Ry. Co.*, 294 S.W. 439.

**App. 1928.** Shippers, having made prima facie case against carrier for damages to animals shipped *held* entitled to have jury pass on question.—*Morrow v. Wabash Ry. Co.*, 6 S.W.(2d) 628.

230 (2). — Care of stock awaiting transportation or delivery.

**App. 1891.** In an action against a railroad for the negligent killing of a horse shipped by plaintiff, *held*, that the evidence was sufficient to make a case for the jury on the question whether, in loading the horse on defendant's car, the stockyards company, which loaded the horse, had acted as the agent of the plaintiff or the agent of defendant.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 43 Mo. App. 450.

In an action against a railroad for negligence in loading a horse on a car, whereby the animal was injured, evidence *held* sufficient to make it a case for the jury whether, at the time of the injury, there was a written contract of shipment.—*Id.*

**App. 1906.** In an action for delay in the transportation of plaintiff's cattle, evidence that defendant's agent assured plaintiff that cars were at hand, knowing that plaintiff would act on such assurance and drive his cattle to the pens for shipment, coupled with the facts that no cars were available, and that the forwarding of the shipment was delayed thereby, was evidence of the carrier's negligence sufficient to authorize submission of such issue to the jury.—*Ficklin v. Wabash R. Co.*, 93 S.W. 861, 117 Mo. App. 211.

**App. 1912.** Whether a shipper of hogs was guilty of contributory negligence in placing them in a poorly ventilated stock pen *held* for the jury.—*Reading v. Chicago, B. & Q. R. Co.*, 145 S.W. 1166, 165 Mo. App. 123.

**App. 1914.** In an action against a railroad company for the death of hogs after delivery to the consignee, the question whether the consignee was negligent in immediately driving them home from the railroad pens where they could not be watered *held*, under the evidence, for the jury.—*Billy v. Chicago, B. & Q. R. Co.*, 171 S.W. 39, 184 Mo. App. 644.

**App. 1915.** In an action for injuries to hogs awaiting shipment, question whether there was delivery and acceptance of the stock by the carrier *held* for the jury.—*Reading v. Chicago, B. & Q. R. Co.*, 173 S.W. 451, 188 Mo. App. 41.

Plaintiff's contributory negligence in placing the stock in certain pens *held* for the jury.—*Id.*

Condition of carrier's pens *held* for the jury.—*Id.*

**App. 1915.** In an action for damage to cattle from their escape from defendant railroad's receiving pens, issues of whether the cattle were normal or wild, and whether the defendant road's pens were reasonably secure, *held* for the jury under the evidence.—*Hardesty v. Atchison, T. & S. F. Ry. Co.*, 179 S.W. 725.

**App. 1916.** In an action for damages to hogs alleged to have been caused by overheating in carrier's pen before shipment, whether the hogs were placed in pen an unreasonably early time before shipment relieving carrier of relation of insurer *held* for jury.—*McSpadden v. Lusk*, 186 S.W. 731.

**App. 1922.** Evidence that the loss to a shipment of hogs resulted while the cars containing them were on a side track at the place of destination before they were placed in a position for unloading, with evidence by an agent of the consignee that the carrier was notified of the situation in time to place the cars for unloading sooner, *held* not to show as a matter of law that the carrier had fully discharged its common-law duty, so as to entitle it to a directed verdict.—*Erisman v. Wabash Ry. Co.*, 243 S.W. 237.

230 (3). — Delay in transportation.

**Sup. 1919.** In an action against a railroad for damage to, and shrinkage in weight of, cattle in transit, it was for the jury to say whether the railroad had discharged its burden, under Public Service Commission Act, § 40, to show delay in transit was not caused by its negligence.—*Cunningham v. Chicago & A. R. Co.*, 215 S.W. 5.

**App.** In an action against a carrier for negligently delaying a shipment of live stock, evidence *held* sufficient to go to the jury on the question whether the delay was negligent.—(1899) *Hamilton v. Wabash R. Co.*, 80 Mo. App. 597; (1908) *Vencill v. Quincy, O. & K. C. R. Co.*, 112 S.W. 1030, 132 Mo. App. 722; (1910) *Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S.W. 987, 139 Mo. App. 702; (1913) *Winslow v. Chicago & A. R. Co.*, 157 S.W. 96, 170 Mo. App. 617; (1914) *McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 341, 181 Mo. App. 142; *McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 344, 181 Mo. App. 244; (1915) *Sikes v. St. Louis & S. F. R. Co.*, 176 S.W. 255, 190 Mo. App. 181; (1917) *Baker v. Bush*, 194 S.W. 1001; (1920) *Jordan v. Chicago, B. & Q. R. Co.*, 226 S.W. 1023, 206 Mo. App. 56; (1924) *Jackson v. Chicago, R. I. & P. Ry. Co.*, 265 S.W. 847.

**App.** 1902. In an action by a shipper against a railway company for failing to carry cattle to their destination within a reasonable time, as agreed, plaintiff proved that the cattle were loaded into three cars, which, together with four cars of cattle belonging to another shipper, were hauled on a special train, arriving in Chicago the following morning at about 7 o'clock; that the cars carrying plaintiff's cattle were detached from the train somewhere on the road, and did not reach the Chicago stock yards until after 10 o'clock that day; that it required some time to get the shipment into condition to be offered for sale; that, though the market remained open until 3 in the afternoon, he could not find a buyer, and was compelled to carry them over, at a considerable outlay, to the following morning; that the market declined about 20 cents per hundred between the day of their arrival and the following day. *Held*, that the question of defendant's exercise of due diligence was for the jury.—*Sloop v. Wabash R. Co.*, 67 S.W. 956, 93 Mo. App. 605.

**App.** 1903. In an action against a carrier for delay in carriage of cattle, the evidence examined, and *held* to make a question for the jury whether the delay had been occasioned by an unavoidable "car famine."—*Chinn v. Chicago & A. Ry. Co.*, 75 S.W. 375, 100 Mo. App. 576.

In an action against a carrier for delay in carriage of cattle, evidence considered, and *held* sufficient to take the case to the jury on the issue whether the delay was unreasonable and whether the shrinkage and depreciation in the cattle was occasioned thereby.—*Id.*

**App.** 1904. In an action against a carrier for delay in delivering live stock, where the

contract did not provide within what time the transportation should be completed, and there was evidence that the special train in which the shipment was made, under ordinary conditions, should have arrived in time for the market the morning following the day of shipment, the question of defendant's exercise of due diligence was a mixed one of law and fact, which was proper for the jury.—*Sloop v. Wabash R. Co.*, 84 S.W. 111, 117 Mo. App. 204.

**App.** 1906. In an action against a carrier for damages occasioned by delay in the transportation of cattle, *held* a question for the jury whether the delay was justified.—*Fulbright v. Wabash R. Co.*, 94 S.W. 992, 118 Mo. App. 482.

**App.** 1906. In an action against a carrier for delay in the transportation of cattle, *held*, that the question whether the delays arose from negligence was one for the jury.—*Bushnell v. Wabash R. Co.*, 94 S.W. 1001, 118 Mo. App. 618.

**App.** 1908. Where, in order to recover for damages to a shipment of mules, it must be shown that the carrier delayed shipment for an unreasonable time, the question of the unreasonableness of the time is for the jury.—*Wernick v. St. Louis & S. F. R. Co.*, 109 S.W. 1027, 131 Mo. App. 37.

**App.** 1909. A carrier must transport stock within a reasonable time, and where unreasonable delays occur without just cause the carrier's negligence is for the jury.—*Libby v. St. Louis, I. M. & S. Ry. Co.*, 117 S.W. 659, 137 Mo. App. 276.

**App.** 1909. Whether a carrier, guilty of delay in a shipment of stock because of a wreck en route, showed that the wreck was the result of unavoidable accident, and was therefore not liable for the delay, *held* for the jury.—*Thompson v. Quincy, O. & K. C. R. Co.*, 117 S.W. 1193, 136 Mo. App. 404.

**App.** 1910. Evidence *held* to raise for the jury the question whether the wreck which caused the delay in the shipment of live stock was the result of negligence.—*Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S.W. 1185, 141 Mo. App. 453.

**App.** 1910. Whether a delay of 10 to 13 hours in the transportation of live stock by a connecting carrier was beyond its power to prevent, or because it did not transport the stock by the first available train, *held*, under the evidence, for the jury.—*Willburn v. Wabash R. Co.*, 129 S.W. 484, 148 Mo. App. 692.

**App. 1914.** When a delay in a shipment of live stock has occurred at several points en route, some of which are unexplained, the question of negligence is for the jury.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 341, 181 Mo. App. 142.

**App. 1914.** Even though the circumstances raise only a slight inference of negligence, this is sufficient to carry to the jury an action for damages for delay in a shipment of cattle.—*McFall v. Chicago, B. & Q. R. Co.*, 168 S.W. 344, 181 Mo. App. 244.

**App. 1915.** In the transportation of live stock, unreasonable delays at points en route wholly unexplained raise a prima facie inference of negligence sufficient to take case to the jury.—*Hunt v. St. Louis, I. M. & S. Ry. Co.*, 173 S.W. 61, 187 Mo. App. 639.

**App. 1915.** Whether the delay in the transportation of stock was unreasonable, so as to render the carrier liable for the injury to the stock, *held* under the evidence for the jury.—*Sikes v. St. Louis & S. F. R. Co.*, 176 S.W. 255, 190 Mo. App. 181.

**App. 1915.** Slight proof *held* sufficient to make question for jury as to negligence respecting delay in transportation, and proof that another carload of live stock was unloaded four hours earlier supported an inference of negligence.—*Smith v. Missouri Pac. Ry. Co.*, 183 S.W. 701.

**App. 1916.** In action against succeeding carrier for damages to interstate shipment of hogs because of delay in delivery, whether an understanding between shipper and defendant, that shipment should be subject to delay because of bridge being out, was made before defendant accepted shipment for transportation *held* for jury.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1918.** In action against railroad company for injuries to shipment of live stock, *held*, under Acts 1913, p. 177, amending Rev. St. 1909, § 3121, question whether railroad company was guilty of negligent delay in transportation of shipment of live stock was for jury.—*Robinson v. Bush*, 200 S.W. 757, 190 Mo. App. 184.

**App. 1918.** In an action against a railroad company for damages for injuries to a shipment of live stock, evidence of delay *held* sufficient under Laws 1913, p. 178, to take the case to the jury.—*Crow v. Bush*, 200 S.W. 762.

**App. 1920.** Where repeated delays occurring en route during a shipment of live

stock are unexplained by the carrier, or where an explanation is attempted and fails, the question of negligence is for the jury.—*Baker v. Schaff*, 221 S.W. 743.

In a shipment of hogs, where plaintiff showed an unusual delay of 8½ hours in a 109-mile run, which should have required 6 hours, and another delay of 4 hours and 25 minutes in an 8-mile run, which should have taken about 3 hours, a prima facie case for negligent delay on defendant's part was made out, justifying the submission of the issue to the jury.—*Id.*

**App. 1921.** In an action for damages for delay in delivering an interstate shipment of cattle, evidence *held* insufficient to carry to the jury the question whether the delay was due to the carrier's negligence, the shipper merely showing that the delay was occasioned by the breaking of a wheel of the refrigerator car, while the carrier's evidence showed that the delay was not the result of negligence.—*Bland v. Chicago & A. R. Co.*, 232 S.W. 232.

**App. 1922.** In an action for negligent delay in transporting hogs, occurring when the shippers were not on the train, so that the causes thereof were within the carrier's exclusive knowledge, negligence *held* for the jury.—*Howell v. Davis*, 236 S.W. 880.

In an action for negligent delay in a shipment of hogs, *held* that the shippers were not contributorily negligent, as a matter of law, in not requesting that the hogs be removed to a proper place after having been placed on a siding where there was no ventilation and not the proper air, in absence of a showing that the shippers' agent knew the hogs would have to remain at such point longer than an hour, or that the carrier permitted them to make suggestions, or would have heeded them if made.—*Id.*

**App. 1922.** In an action for negligent delay in transporting live stock, evidence of negligence in placing the cattle on a siding in the hot sun, when they could have been disposed of so as to have better ventilation, *held* sufficient to take the case to the jury.—*Neely v. Hines*, 237 S.W. 906.

**App. 1925.** Whether strike of shopmen causing delay to interstate shipment of live stock was unavoidable *held* for jury.—*Warner v. St. Louis-San Francisco Ry. Co.*, 274 S.W. 90, 218 Mo. App. 314.

Whether delay to intrastate shipment of live stock was caused by strike of shopmen *held* for the jury.—*Id.*

**App. 1927.** Mere unexplained delay of six or seven hours from point in Indiana to point near New York City of poultry shipment *held* insufficient to make *prima facie* case of carrier's negligence for jury.—*Parsons v. Chicago, B. & Q. R. Co.*, 300 S.W. 324.

To show that carrier's delivery of interstate poultry shipment was not made within reasonable time, shipper must adduce some proof of carrier's negligence to make case for jury.—*Id.*

←230 (4). — *Care of stock in transit.*

**Sup. 1877.** Where a contract of carriage for the shipment of hogs requires the shipper to see that the cars are safely and properly fastened, so as to prevent the escape of hogs, the question whether the duty so imposed on the shipper has been performed is for the jury.—*Clark v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 440.

**Sup. 1878.** Failure of a shipper of mules to notify the carrier to put his car on the track by the stock pens, so that he might unload, feed, and water them while awaiting the car of a connecting carrier, until after the engine pulling the train had left, would not defeat his recovery as matter of law; the evidence showing that the engine only remained some 15 or 20 minutes, and it appearing that immediately on arrival the shipper left the train to inquire about the train of the connecting line, and, learning that it had gone, then made his demand.—*Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

**App. 1889.** In an action by a shipper against a carrier for the loss of a horse, defendant gave evidence tending to show that the acting foreman of defendant opened the end door or window of the car in which the horse had been placed, that this end door or window was an aperture commencing about half way up from the bottom of the car, 18 inches wide and 30 inches high; that after the horse had been placed in the car, and the side door securely fastened, and this aperture opened to give it ventilation, the foreman beckoned to the engineer to move the car forward for the purpose of attaching it to the train; that when the engine started forward with the car the horse became frightened, and jumped through this small aperture upon the track, and was run over and killed. *Held*, that it was a question for the jury whether the horse got out of the car in that way, and, just in so far as upon ordinary human experience it was improbable that a horse of that size could so escape, the defendant is

relieved from the imputation of negligence in moving the car with the horse loose in it and the aperture open, and defendant was entitled to an instruction to that effect.—*Doan v. St. Louis, K. & N. W. Ry. Co.*, 38 Mo. App. 408.

**App. 1894.** Where the defense in an action for negligence in shipping a jack was that notice of the injury was not given within five days, as required by the shipping contract, but the evidence showed that within three days notice was given to the local agent, that the local agent informed the general agent within five days and requested plaintiffs to wait a few days to see the extent of the injury, and that plaintiffs wrote to the general agent and received a reply that the claim was in the hands of the local agent for information and would receive prompt attention, it was sufficient to defeat a demurrer to the evidence.—*Crow v. Chicago & A. R. Co.*, 57 Mo. App. 135.

**App. 1897.** Evidence, in an action against a carrier for its failure to carry safely live stock delivered to it for transportation, examined, and *held* to require the submission to the jury of the question of the carrier's negligence.—*Lachner v. Adams Express Co.*, 72 Mo. App. 13.

**App. 1901.** In an action against a carrier for loss of an animal in transitu, a demurrer to plaintiff's evidence was properly denied, where plaintiff had four witnesses, who adduced evidence tending to show that defendant negligently operated its train of cars, and that such negligence was the proximate cause of the loss; their testimony not being in opposition to obvious physical facts.—*Bowring v. Wabash Ry. Co.*, 90 Mo. App. 324.

**App. 1904.** Proof that horses were in good physical and serviceable condition when received by a railway company for shipment, that in course of transportation a casualty ensued, that when rescued the horses bore marks of the accident, and subsequently they were and continued in unserviceable shape, unmanageable, and consequently reduced in value, established a *prima facie* case for the jury as to the liability of the company.—*Keyes-Marshall Bros. Livery Co. v. St. Louis & H. Ry. Co.*, 80 S.W. 53, 105 Mo. App. 556.

**App. 1907.** In an action against a railroad for injuries to plaintiff's shipment of hogs through defendant's wrongful exposure of them during transportation to a virulent disease, the question whether cholera germs could have been transmitted by contact or ex-



halation was one for the jury.—*Council v. St. Louis & S. F. R. Co.*, 100 S.W. 57, 123 Mo. App. 432.

**App. 1916.** In action against carrier for damage to interstate shipment of hogs, where there was evidence that hogs had become very warm by piling up in car, and then were unloaded into pens over protest of plaintiff's agent, question as to disease from which hogs died, or what caused it, *held* for jury.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S.W. 131.

**App. 1918.** In action against railroad company for injuries to shipment of live stock, question whether company was guilty of negligent operation of train transporting stock *held* for jury.—*Robinson v. Bush*, 200 S.W. 757, 199 Mo. App. 184.

**App. 1919.** Evidence *held* sufficient to take to the jury the question of a railroad company's negligence in placing cars containing fat cattle at a point where the cattle could not obtain air; it appearing that the cattle might have been placed at another point while waiting to be carried on their journey.—*Berry v. Chicago & A. R. Co.*, 208 S. W. 622.

**App. 1920.** In an action against a carrier for injuries to a jack shipped to plaintiff by a third person, which, when unloaded, was lame and subsequently died, evidence *held* to make the question of defendant's negligence one for the jury.—*Schade v. Missouri Pac. R. Co.*, 221 S.W. 146, 204 Mo. App. 88.

**App. 1920.** In an action against a railroad for failure to properly carry and deliver a shipment of live stock, whether there was negligence on the part of defendant railroad, in view of disclosure by the evidence that three or four cows in the shipment were in a weakened condition when received by it, *held* for the jury under the evidence.—*Byrum v. Chicago & A. R. Co.*, 226 S.W. 91.

**App. 1922.** In an action for death of hogs in transit, evidence as to whether the hogs died from congestion of the lungs brought on by inherent weakness *held* to present a question for the jury.—*Hartford Fire Ins. Co. v. Payne*, 243 S.W. 357, certiorari quashed (1923) *State ex rel. Hartford Fire Ins. Co. v. Trimble*, 250 S.W. 393, 298 Mo. 418.

**App. 1923.** In an action by a shipper for value of hogs which died in transit, evidence tending to show that the cause of death was the overheated condition of the hogs,

brought about by the carrier's failure to provide them with water or to place water in the car, *held* sufficient to make the question of the carrier's negligence one for the jury.—*Stallings v. Missouri Pac. R. Co.*, 251 S.W. 143.

**App. 1923.** In action for injuries to sheep in shipment, plaintiff's evidence *held* sufficient to warrant submitting to the jury the question of whether defendant was guilty of negligence in not complying with 45 US CA §§ 71-74, relative to care of stock.—*Johnson v. Wabash Ry. Co.*, 251 S.W. 719.

**App. 1923.** In action for injuries to live stock shipment, evidence that animals were in good condition when delivered to the carrier but were skinned up and in a maimed condition when delivered at the point of destination, and that a partition which was securely put in place during the transportation was down on arrival of animals at another point, *held* sufficient to raise an inference of negligence in the management of the train, making the question one for the jury.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

**App. 1924.** Evidence of injured condition of animals, indicating external violence during transportation, *held* sufficient to go to jury on question of defendant carrier's negligence.—*Morrow v. Wabash Ry. Co.*, 263 S.W. 851, 219 Mo. App. 62.

**App. 1925.** Evidence *held* sufficient to go to jury on question of carrier's negligence for death of cow during shipment.—*Long v. American Ry. Express Co.*, 274 S. W. 906, 219 Mo. App. 451.

**App. 1926.** Evidence of negligent injury to unaccompanied live stock shipment *held* to make question for trier of facts.—*Shaffer v. American Ry. Express Co.*, 282 S.W. 725.

#### 230 (5). — Limitation of Liability.

**Sup. 1882.** In an action against a carrier of live stock, evidence examined, and *held* to justify the court in submitting to the jury the question of the negligence of the carrier, rendering it liable, notwithstanding its contract relieving it from its common-law liability.—*Dawson v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 514.

**App. 1915.** Though the notice of injury to a shipment, arriving at destination August 1st, was dated August 5th, testimony of the shipper that he delivered it the day of the arrival, or the next morning, raises a question for the jury as to its having been given

in the time required by contract.—*Ball v. Lusk*, 175 S.W. 238, 189 Mo. App. 297.

←230 (6). — **Liability of connecting carrier.**

**App. 1900.** Plaintiff contracted for the carriage of horses over the line of a carrier, and also over the line of a connecting carrier, and paid the first carrier the entire transportation charges. The connecting carrier did not know of the payment of such charges, and refused to deliver the horses until his charges were paid; and plaintiff brought action against the connecting carrier for conversion. *Held*, that whether the first carrier was the agent of defendant in contracting for the carriage over the latter's line was a question of fact for the jury.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

**App. 1903.** In an action against a railroad company for injury to cattle, caused by delay of the connecting carrier in forwarding the cattle from the point of intersection with defendant's road, plaintiff's evidence, showing that the contract of shipment made with defendant's agent provided in express terms for a through shipment to a point on the intersecting line, was sufficient to submit the issue of the terms of the contract to the jury.—*Faulkner v. Chicago, R. I. & P. Ry. Co.*, 73 S.W. 927, 99 Mo. App. 421.

In an action against a railroad company for injury to cattle caused by delay of the connecting carrier, plaintiff's evidence showing previous contracts made with defendant's station agents for shipment of cattle to points on connecting lines, which contracts had been carried out by defendant, was, in the absence of knowledge by plaintiff that defendant's agents were forbidden to enter into such contracts, sufficient to submit the issue of agent's authority to enter into the contract to the jury.—*Id.*

←230 (7). **Instructions.**

**Sup. 1883.** Whether the liability of plaintiff was that of a common carrier, as contradistinguished from that of a forwarder, was determinable by the facts, and the facts upon which the liability of plaintiff as a common carrier were predicated should have been stated in the instruction, so that the triors of the fact could determine whether such facts had been established by the evidence. It makes no difference in this respect that the cause was tried by the court without the intervention of a jury.—*St. Louis, K. C. & N. Ry. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13.

**App. 1894.** Where the evidence showed that plaintiffs, to whom mules were shipped, did not tender the freight until the day after their arrival, an instruction on the hypothesis that they demanded the mules and tendered the freight on the day of arrival was erroneous.—*Scott Bros. v. Chicago & A. R. Co.*, 57 Mo. App. 345.

**App. 1896.** In an action against a carrier to recover damages for the breach of a verbal contract to receive and ship cattle, the undisputed evidence showed that defendant's station agent who made the contract was authorized to receive and forward freight, and that the making of the contract in question was within the scope of his apparent authority, and it was not shown that plaintiffs had knowledge of the fact, if it was a fact, that he was acting beyond his authority. *Held*, that it was not prejudicial error for the court to direct the jury to the effect that the evidence was sufficient to establish the authority of defendant's agent to make the contract, as the jury under a proper instruction could not have found otherwise.—*Wilson v. Missouri Pac. Ry. Co.*, 66 Mo. App. 388.

**App. 1897.** Plaintiff shipped a car of stock over defendant's road, billed to the National Stockyards in East St. Louis, and the stock was carried by defendant to the Union Stockyards in St. Louis, where it was delivered to a commission firm doing business there and sold in that market and the proceeds remitted to plaintiffs. In an action to recover for the loss incident to defendant's failure to deliver the stock at East St. Louis, two plaintiffs testified that, if the sheep in such car load of stock had been sold in East St. Louis, they would have sold for \$1 more on the 100 pounds, and that the hogs in the car load would have sold for 10 per cent. more per 100 pounds than the parties were able to get at the yards in St. Louis. *Held*, that the evidence justified an instruction that plaintiffs were entitled to recover whatever difference, if any, there was between what the stock sold for at the Union Yards at St. Louis and what the same would have sold for on the same day at the National Yards in East St. Louis.—*Tandy v. Wabash R. Co.*, 68 Mo. App. 431.

**App. 1921.** In a suit by a live stock shipper against a carrier for breach of an oral agreement to furnish cars, failure to instruct as to the meaning of the term "oral contract" *held* not error.—*Thee v. Wabash Ry. Co.*, 233 S.W. 959, 208 Mo. App. 200.

**App. 1922.** All acts of a shipper do not relieve a carrier from liability, and hence

an instruction that a carrier, sued for loss of a hog, should not be held liable if its death was due to an act of plaintiff shipper, was erroneous, as excusing the carrier from liability if its death was due to any act of the shipper.—*Browning v. Wells Fargo & Co. Express*, 243 S.W. 190.

**App. 1923.** In an action against a railroad for injuries to live stock shipment, petition containing a general allegation of negligence on the part of the railroad *held* to authorize instruction as to negligence in failing to furnish a safe car.—*Moran v. Chicago, B. & Q. R. Co.*, 255 S.W. 331.

In an action for injury and death of horse during transportation an instruction that it was defendant's duty to furnish a car that was reasonably safe and suitable, and that such duty required not only that it should be safe as originally furnished but also that it should be kept so and that its appurtenances should be so attended as to render the inclosure by the car safe, *held* erroneous, in that it was an abstract proposition misleading to jury.—*Id.*

**App. 1924.** In an action for unreasonable delay in furnishing cars for loading of stock, instruction that carrier would be liable, if it "unreasonably delayed in furnishing" such cars, *held* to include defense that delay was caused by shopmen's strike, and testimony in support thereof.—*Fewel v. St. Louis & S. F. Ry. Co.*, 267 S.W. 960.

**App. 1925.** Instruction permitting recovery for failure to furnish cars contracted for *held* erroneous.—*Williams v. St. Louis-San Francisco Ry. Co.*, 274 S. W. 935, 217 Mo. App. 662.

**App. 1927.** Instruction that shipper of cattle, under contract, was entitled to benefit of particular market *held* improper.—*Bailey v. St. Louis & S. F. Ry. Co.*, 290 S.W. 630.

Instruction permitting shipper of cattle to recover loss from forced sale on Chicago market through breach of contract *held* not erroneous.—*Id.*

230 (8). — Delay in transportation.

**Sup. 1876.** Instructions in an action against a carrier for injury to live stock caused by delay in transportation approved.—*Tuggle v. St. Louis, K. C. & N. Ry. Co.*, 62 Mo. 425.

**App. 1885.** Where the delivery of live stock by a carrier was delayed from the 21st to the 23d of December, an instruction that

the measure of damages was the difference in the value of the stock "between" the 21st and the 23d of December was not erroneous, as being likely to mislead the jury into believing that the value of the goods on the 22d of December might be taken as the basis for the assessment of damages, though the evidence showed that the price of stock was higher on the 22d than on the 23d.—*Armstrong v. Missouri Pac. Ry. Co.*, 17 Mo. App. 403.

**App. 1895.** Where a contract for shipment of cattle provided the carrier's liability should cease when it delivered the cars containing the cattle upon the tracks of the stockyards, but the evidence showed that the carrier, when cattle were consigned to the stockyards, always delivered them at the chutes with its own engines, cars, and crew, though only on signal from the stockyards people, and the delay complained of was partly before and partly after reaching the stockyards tracks, instructions which directed a verdict for defendant, based upon such provision, without reference to whether the delay was the fault of defendant, were properly refused.—*Blanchard v. Chicago & A. Ry. Co.*, 60 Mo. App. 267.

**App. 1903.** In an action against a carrier for delay in a shipment of live stock, an instruction asked by plaintiff that if the jury found that defendant had promised to furnish plaintiff a car on the day therein named, and failed to keep its promise, then they should find for plaintiff, would have been well enough if it had gone further and submitted the points raised by the evidence of defendant.—*Helm v. Missouri Pac. Ry. Co.*, 72 S.W. 148, 98 Mo. App. 419.

**App. 1910.** In an action for delay in transporting live stock because of a wreck on defendant's road, an instruction that "it devolved on defendant to show \* \* \* that said wreck was unavoidable and occurred without any negligence on the part of defendant," satisfies the rule that defendant was required only to show that the wreck was unavoidable by the exercise of reasonable care.—*Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S.W. 1185, 141 Mo. App. 453.

**App. 1916.** In action against succeeding carrier for damages to an interstate shipment of hogs, instruction which told jury that, before verdict for plaintiff could be returned, they must find that defendant failed to transport hogs in reasonable time, and that by reason of said failure hogs were injured so that some of them died, was not improper.—

**Bowles v. Quincy, O. & K. C. R. Co.**, 187 S.W. 131.

**App. 1917.** In action for damage to stock shipment caused by carrier's delay, instructions as to damages should have defined shrinkage for which plaintiff could recover; some shrinkage naturally occurring on such a shipment.—**Baker v. Bush**, 194 S.W. 1061.

**App. 1922.** In an action for delay in a shipment of hogs, in which there was evidence of minor delays which were explained and were not unusual, an instruction in favor of plaintiffs if the hogs were "negligently delayed" without informing jury what was meant by words "negligently delayed" *held* erroneous.—**Howell v. Davis**, 236 S.W. 889.

**App. 1922.** In an action for negligent delay in transporting live stock, an instruction as to the burden of proving negligent delay, and that proof of delay alone was not sufficient to establish negligence, but authorizing the jury to infer negligence from facts and circumstances proven in evidence, was erroneous, where the jury were not told what facts and circumstances constituted negligence.—**Neely v. Hines**, 237 S.W. 906.

**App. 1923.** In action for negligent delay in shipment of a carload of cattle, where there was but one delay proved, which defendant explained in a manner consistent with the exercise of due care on its part, an instruction submitting generally the matter of delay was not misleading, in that it did not point out or define what would constitute negligence or any facts necessary to be found to convict defendant thereof.—**Marsh v. Davis**, 251 S.W. 390.

**App. 1924.** Where shipping contract provided that carrier was not bound to transport cattle by any particular train or for a particular market or otherwise than with reasonable dispatch, but should have right in case of physical necessity to forward them by any carrier or route between shipping point and destination, instruction that it was duty of carrier to transport cattle in usual and customary manner and route *held* not warranted by evidence.—**Sandker v. Wabash Ry. Co.**, 267 S.W. 957; **Phillippi v. Sumie**, 267 S.W. 960.

←230 (9). — Care of stock by carrier.

**App. 1885.** Though a contract for the shipment of cattle provided that claims for injury to the cattle would not be allowed unless made within five days from the time that the cattle were removed from the cars, an instruction that the shipper could not recover

for injuries to the cattle, where he failed to make a claim therefor within the five days, "unless it further appears from the evidence that defendant received plaintiff's claim in some other manner than that specified, within five days, and at the time made no objection to the manner in which it received notice thereof," was not erroneous.—**Potts v. Wabash, St. L. & P. Ry. Co.**, 17 Mo. App. 394.

**App. 1887.** Where, in an action for damages for injuries to stock shipped over defendant's railroad, there was evidence of the value of the cattle on the market in the condition they were in on their arrival at their destination, and what they would have been worth had they arrived with only the ordinary damage resulting from shipment, and the evidence also tended to show that the stock suffered some injury from overloading and other causes for which defendant was not liable, an instruction stating that the measure of damages was the difference between the value of the stock if it had arrived in good condition and what it was worth when it arrived in the injured condition was erroneous, as allowing damages for injuries for which defendant was not responsible.—**Jones v. Chicago & A. R. Co.**, 28 Mo. App. 28.

Where, in an action for damages for injuries to stock shipped over defendant's railroad, there was evidence showing the amount the cattle were worth on the market in the condition they were in on their arrival at the place of destination, and what they would have been worth had they arrived with only the ordinary damage resulting from shipment, an instruction stating that, if the jury found any damage was done to the cattle through defendant's negligence, they should, in arriving at the damage, find what the cattle would have been worth in the market if they had arrived at their destination in good condition, and what they were worth when then arrived in the condition as shown by evidence, was not erroneous for failing to limit the recovery to that part of the damage which resulted from the injury for which defendant was liable.—*Id.*

**App. 1889.** In an action by a shipper against a carrier for the loss of a horse during shipment, *held*, that an instruction leaving it to the jury to say whether the rate paid by plaintiff for freight charges was less than the usual and reasonable rates for carrying horses of that character was erroneous, in that it injected an element into the case which was not presented by the evidence.—

**Doan v. St. Louis, K. & N. W. Ry. Co., 38 Mo. App. 408.**

**App. 1891.** In an action against a carrier for negligence in the transportation of live stock, the submission of an instruction predicated on defendants having failed to provide any stopping place along the route where the animals could be fed and watered was error, where negligence in that respect was neither charged in the petition nor brought out by the evidence.—*Wolfert v. Pittsburg, C. & St. L. Ry. Co., 44 Mo. App. 330.*

In an action against a carrier for negligence in the shipment of live stock, plaintiff, in order to be entitled to the benefit of Rev. St. U. S. § 4386, requiring railroads to feed and water cattle every 28 hours, should submit an apt instruction to that end.—*Id.*

**App. 1895.** In an action for injuries to hogs resulting from the car in which they were shipped not having trap doors in the roof, an instruction that, if the hogs died from overlaying or suffocation, it was by the fault of defendant in not furnishing a suitable and proper car, was erroneous, in that it assumes that, had there been trap doors, the person accompanying the hogs could have succeeded in keeping the hogs from smothering.—*Paddock v. Missouri Pac. Ry. Co., 60 Mo. App. 328.*

**App. 1897.** An instruction in an action against a carrier for failing to carry safely live stock delivered to it for transportation, imposing on the carrier the duty of exercising all reasonable diligence for the safety of the stock, is not erroneous, when read in connection with other instructions which declare that the carrier was only required, while transporting live stock, to exercise such care as would be exercised by a prudent man in the treatment of his own property.—*Lachner v. Adams Express Co., 72 Mo. App. 13.*

An instruction, in an action against a carrier for failing to carry safely live stock delivered to it for transportation, which authorizes interest from the date of the commencement of the suit, instead of from the date the property should have been delivered at the place of destination, though erroneous, is not prejudicial to the carrier.—*Id.*

**App. 1903.** In an action to recover for the transportation of a jack, where damages for the death of the jack as a result of plaintiff's negligence were set up as a counterclaim, error in refusing an instruction that

plaintiff was not liable on the counterclaim if the jack died from pneumonia or lung trouble, and his position in the crate in which he was placed did not produce or aggravate the disease so as to cause his death, was cured by instructions that plaintiff was not liable unless the disease was caused by plaintiff's negligence, and that the burden was on defendant to prove that negligence, and that it caused the disease of which the jack died.—*Pacific Exp. Co. v. Emerson, 74 S.W. 132, 101 Mo. App. 62.*

**App. 1908.** In an action against a carrier for injuries to cattle during transportation, a request to charge that, when the carrier placed the cars at the unloading platforms in a position to be unloaded and delivered the billing to stockyards company, "provided it used reasonable diligence in transporting them thereto," it performed every act required of it as a carrier to complete the delivery, and was not liable for damages resulting from a subsequent delay, caused either by the failure of the stockyards company to post on the bulletin board the arrival of the stock, or the consignee to receive it promptly, was properly modified by adding the words quoted to distinguish between damages arising after delivery at the stockyards and those arising on account of negligence of the defendant during transportation before arrival.—*Ratliff v. Quincy, O. & K. C. R. Co., 110 S.W. 606, 131 Mo. App. 118.*

**App. 1909.** Where a petition alleged that horses were injured by defendant's carelessness, in that other horses were permitted to trample upon horses which were down on the floor, and the latter kicked and injured the other horses which were also knocked down and trampled upon, an instruction authorizing a recovery if some of plaintiff's horses were injured by being knocked down, thrown, or falling down upon the floor, etc., was erroneous as authorizing a recovery on a different theory than that alleged.—*Barr v. Quincy, O. & K. C. R. Co., 120 S.W. 111, 138 Mo. App. 471.*

**App. 1910.** In an action against a carrier for damages by breach of the contract of shipment an instruction that if defendant did not deliver the cattle to the consignee in good condition, being prevented only by the act of God or the public enemy, and plaintiff sustained damage by reason of such failure, the carrier was liable, was erroneous as making it liable, though prevented from delivering the cattle by act of God or the public

enemy.—*Edwards v. Lee*, 126 S.W. 191, 147 Mo. App. 38.

**App. 1911.** In an action against a carrier for injuries to mules in transit, an instruction that the burden was on plaintiff to show that the injuries to the mules were the direct result of defendant's negligence, and were not the result of some other cause or of the vicious propensities of the animals, was too vague, in that it did not inform the jury what act of the defendant would constitute negligence, if any, and, in the absence of any other instruction specifically defining the particular facts which would constitute negligence or carelessness justifying the recovery, was reversible error.—*Cornett v. Chicago & A. R. Co.*, 138 S.W. 51, 158 Mo. App. 360.

**App. 1915.** An instruction in action against a carrier for loss of stock escaping from pens *held* erroneous as imposing too high a burden on carrier.—*Humphreys v. St. Louis & H. Ry. Co.*, 178 S.W. 233, 191 Mo. App. 710.

**App. 1921.** In an action by the shippers of hogs for injuries thereto in transit, the trial court erred in giving plaintiffs' instruction submitting to the jury the question whether other cars shutting out air from the shipment were placed near the hogs on a side track, there being no evidence of such placing of other cars, testimony that "ordinarily you will find lots of box cars there" not constituting evidence such cars were present at the time.—*Howell v. Hines*, 227 S.W. 619.

**App. 1925.** Instruction as to carrier's failure to properly attend to sick and injured cow *held* warranted under the evidence.—*Long v. American Ry. Express Co.*, 274 S.W. 906, 219 Mo. App. 451.

**App. 1925.** Instruction submitting negligence of carrier in surrounding plaintiff's cattle with other trains of cars *held* justified by evidence.—*Nigh v. Chicago, R. I. & P. Ry. Co.*, 276 S.W. 1038, 220 Mo. App. 766.

**App. 1928.** Instruction authorizing recovery against carrier, though finding damages were caused by vicious propensities of stock and owner's negligence, *held* erroneous.—*Morrow v. Wabash Ry. Co.*, 289 S.W. 343.

#### 230 (10). — Limitation of Liability.

**App. 1876.** Where the contract of carriage between a railroad and the shipper of live stock relieved the carrier from liability from loss or damage, save from the carrier's

own carelessness or neglect, an instruction that if, by reason of delay, the cattle were exposed to injury and were injured, plaintiff was entitled to recover, unless defendant had shown that the delay was caused by obstructions of the road or failure of machinery, which could not have been prevented by due care, was proper.—*Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

**App. 1894.** While an instruction that the special contract for the shipment of a jack was not binding on plaintiff, unless in consideration of the stipulations in the contract defendant agreed to carry the jack for less than the usual or reasonable rate, or plaintiff received some advantage which he would not have received, but for entering into such contract, was too broad, the limitation of damages only being not binding on plaintiff in the absence of consideration, yet, where the evidence showed that the other parts were complied with, the giving of the instruction was not prejudicial.—*Crow v. Chicago & A. R. Co.*, 57 Mo. App. 135.

**App. 1894.** A railroad, by contract, provided against its liability for loss or damage after it had delivered cars containing cattle on the tracks of the stock-yards company. Its trainmen ran the switch engine over the tracks of the stock-yards company, and in an action by the shipper for damages for delay the evidence tended to show that the delay complained of occurred on the tracks of the stock-yards company. *Held*, that the railroad company was not entitled to an instruction unconditionally exempting it from liability for such delay, and it was not error to modify it by inserting a qualification as to defendant's negligence.—*Leonard v. Chicago & A. R. Co.*, 57 Mo. App. 366.

**App. 1931.** In an action against a carrier for the loss of an animal while in transitu, defendant set up contract of freightment, stating that the rate charged was a special one, and in consideration thereof the carrier's liability was limited, but there was extrinsic evidence showing that the rate charged was in fact the regular one. *Held*, that an instruction which told the jury that, if it found that the rate charged plaintiff was the "only rate" and the usual schedule rate charged every one for a like shipment, then such rate was not a reduced rate, was erroneous in expression.—*Bowring v. Wabash Ry. Co.*, 90 Mo. App. 324.

**App. 1933.** In an action against a carrier for delay in a shipment of live stock, defendant was entitled to an instruction that if

plaintiff entered into a written contract with defendant for the transportation of his cattle, and by the terms thereof it was provided that the shipment was not to be made within any specific time, nor in time for any particular market, then defendant was only liable for unreasonable delay.—*Helm v. Missouri Pac. Ry. Co.*, 72 S.W. 148, 98 Mo. App. 419.

**App. 1913.** Where a contract for an interstate shipment of mules limits the liability for injury to the proportion of the agreed valuation, an instruction that the jury must accept the agreed valuation and assess the damage caused by delay in those proportions only was proper.—*Wyatt v. Missouri Pac. Ry. Co.*, 158 S.W. 720, 173 Mo. App. 210.

**App. 1919.** In action by intrastate shipper of a stallion in Kansas, under the declared valuation on which the rate was based, an instruction was erroneous which submitted to the jury the question of whether the shipper knowingly accepted the reduced rate based on the declared value; the shipper's knowledge of the lawful rate being conclusively presumed by Kansas law, which controlled.—*Strother v. Atchison, T. & S. F. R. Co.*, 212 S.W. 404.

**App. 1924.** In an action against an express company for loss of a jack killed in transit, an instruction limiting defendant's exemptions from liability to the inherent vice or vicious propensities of the jack *held* not erroneous, where no other exemptions, such as those arising from an act of God or the public enemy, or the shipper's fault, were invoked by defendant.—*Ward v. American Ry. Express Co.*, 259 S.W. 514.

230 (11). — **Liability of connecting carriers.**

**App. 1900.** In an action against a connecting carrier for conversion because of its refusal to deliver horses carried by it until its compensation was paid, such compensation having been paid to the first carrier without defendant's knowledge, the instructions reviewed, and *held* to be correct.—*Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

230 (12). — **Damages.**

**App. 1896.** In an action for damages for the breach of a verbal contract by which defendant undertook to receive and ship several car loads of cattle on a certain day, the petition alleging the provision in the contract to the effect that plaintiff's cattle were to be shipped on the day named, so as to be on the Kansas City market on the next day, suffi-

ciently imparted the information that the cattle were designed for sale in that market, and therefore warranted an instruction that, in estimating the damages, the jury should take into consideration the variance in the value of the cattle in Kansas City between the time they should have reached there and the day of their arrival.—*Wilson v. Missouri Pac. Ry. Co.*, 66 Mo. App. 388.

**App. 1906.** Where, in an action against a carrier for delay in transporting live stock, the right to recover was predicated on the fact that there had been an unreasonable delay, an instruction authorizing an award as damages of the difference in value between the value of the live stock in the condition that they were in when delivered, and the value had they been delivered "without delay," was not objectionable for failing to admit the word "reasonable" before the words "without delay."—*Farmers' Bank of Ladonia v. Wabash R. Co.*, 95 S.W. 286, 119 Mo. App. 1.

An instruction, in an action for delay in transporting live stock, which limits the recovery to damages resulting from loss by shrinkage and loss of a better market, is not inconsistent with an instruction denying a right to recover for cattle injured in the transportation.—*Id.*

**App. 1916.** In action for damages to shipment of cattle, where there was no evidence of injury to a bull, instruction allowing damages to the extent of his valuation under the shipping contract *held* erroneous.—*Greening v. Chicago & N. W. Ry. Co.*, 183 S.W. 1121.

**App. 1924.** Where, in an action against a carrier for damages based on shrinkage in weight of sheep alleged to have been caused by defendant's negligent delay in transporting shipment, plaintiff's claim for damages was based on the allegation that 50 lambs were damaged by being trampled and in bad condition, instruction that, if the delay caused more culls, jury could allow for the extra culls, *held* not to require reversal on the theory the instruction was broader than the pleadings, since, if the lambs were in bad condition, they would be culled.—*Prebe v. Quincy, O. & K. C. R. Co.*, 260 S.W. 816.

**App. 1924.** In an action by shipper against a carrier for damages for unreasonable delay in furnishing cars, where there was no evidence to support a verdict of \$100 on a certain count, an instruction authorizing a recovery not exceeding \$100 on that count was erroneous as being broader than the evi-

dence.—*Morrison v. St. Louis-San Francisco Ry. Co.*, 264 S.W. 449.

**App. 1924.** Where, in shipper's action for damages to cattle, three of which died, evidence showed that death of one of them was not attributable to the fault of defendant, instruction authorizing recovery for death of three cattle was broader than the evidence.—*Sandker v. Wabash Ry. Co.*, 267 S.W. 957.

**App. 1925.** Evidence *held* to justify instruction as to necessity of shipper of cattle to hold over for day or two to make up shrinkage sustained during transit.—*Nigh v. Chicago, R. I. & P. Ry. Co.*, 276 S.W. 1038, 220 Mo. App. 766.

**App. 1925.** Instruction on measure of damages for injuries to live stock *held* not erroneous.—*Morrow v. Wabash Ry. Co.*, 276 S.W. 1030, 220 Mo. App. 518.

Instruction authorizing damages for injury to animals sold at way point, without finding that injuries necessitated sale, *held* erroneous.—*Id.*

**App. 1927.** In action against carrier for injury to stock shipment, instruction as to measure of damages *held* not misleading, confusing, and incomplete.—*Dillen v. Wabash Ry. Co.*, 294 S.W. 439.

#### ◊230 (13). Verdict and findings.

**App. 1915.** In an action for the death of hogs in shipment, the verdict *held*, under the evidence, not to award a recovery for hogs dying after shipment had passed beyond defendant's line.—*Botts v. St. Louis & H. Ry. Co.*, 177 S.W. 746, 191 Mo. App. 676.

#### ◊231. — Judgment.

**App. 1910.** Under Rev. St. 1899, § 5222, as amended by Laws 1905, p. 54 (Ann. St. 1906, p. 2718), authorizing a shipper suing for injury to freight to join as defendants the original carrier and all connecting carriers, and to recover from the carrier through whose negligence the loss was sustained the amount thereof, a shipper of live stock who sues the initial and connecting carriers jointly for damages occasioned by a delay in transportation may only recover from the carrier responsible for the delay.—*Wilburn v. Wabash R. Co.*, 129 S.W. 484, 148 Mo. App. 692.

### IV. CARRIAGE OF PASSENGERS.

Who are common carriers, see ante, ◊4.

#### (A) RELATION BETWEEN CARRIER AND PASSENGER.

Disobedience of rules of carrier as ground for ejection, see post, ◊359.

Rules of carrier in respect to passenger's baggage, see post, ◊389.

Rules of carrier in respect to performance of contract of transportation, see post, ◊267.

#### ◊233. Nature of the relation.

See explanation, page iii.

#### ◊234. What law governs.

**Sup. 1914.** A contract whereby a carrier is released for all damages for injuries received by a passenger through carelessness of the carrier, made absolutely void under the law of a sister state, where the passenger was injured, will not be given any effect by the courts of Missouri, in an action by the passenger for the injuries.—*Wentz v. Chicago, B. & Q. R. Co.*, 168 S.W. 1166, 259 Mo. 450, Ann. Cas. 1916B, 317.

**App. 1905.** A contract by a railroad to carry a passenger and baggage from a point in Illinois to a point in Missouri, when made in Illinois, is an Illinois contract, governed by the laws of that state, and is not affected by Rev. St. 1899, § 5222, making a carrier liable for the loss of property caused either by its own or some connecting carrier's negligence.—*Hubbard v. Mobile & O. Ry. Co.*, 87 S.W. 52, 112 Mo. App. 459.

**App. 1910.** A contract of carriage evidenced by a ticket is governed by the law of the state where made.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

**App. 1915.** Where the negligence of a carrier occurred in Missouri, the law of Missouri governs the rights of the parties.—*Coy v. St. Louis & S. F. R. Co.*, 172 S.W. 446, 186 Mo. App. 408.

**App. 1916.** In a passenger's action for loss of baggage, where the contract of carriage as contained in her transportation was made in a foreign country, but there was no evidence as to the law of such foreign country, the law of the former governs.—*Drozinski v. Hamburg-American Line*, 181 S.W. 1164, 193 Mo. App. 60.

**App. 1924.** Where relation of carrier and passenger existed between one accompanying interstate shipment of stock as caretaker and defendant, *held*, that right of caretaker to recover for personal injury and his duty to give notice of such injury was gov-



erned by the common law and not by federal statutes (such as 49 USCA § 20), relative to claims arising from interstate shipments of property.—*Edmondson v. Missouri Pac. R. Co.*, 264 S.W. 470.

**App. 1928.** Duty of caretaker accompanying interstate shipment of cattle to give notice of personal injury was determined under common law, federal statutes being inapplicable (49 USCA § 20).—*Edmondson v. Missouri Pac. R. Co.*, 8 S.W.(2d) 103.

235. Who are carriers.

**Sup.** A street railroad company is a common carrier of passengers for hire.—(1903) *Jackson v. Grand Ave. Ry. Co.*, 24 S. W. 192, 118 Mo. 109; (1904) *Redmon v. Metropolitan St. Ry. Co.*, 84 S.W. 26, 185 Mo. 1, 105 Am. St. Rep. 558.

**Sup.** Persons operating elevators in buildings are carriers of passengers.—(1904) *Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 182 Mo. 597; (1905) *Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**Sup. 1909.** A company engaged in operating and managing an office building, and in connection therewith operating a passenger elevator for the use of tenants and others, is a common carrier of passengers.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**App. 1910.** A company engaged in the livery business does not hold itself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as it chooses, and is in no sense a common carrier.—*Trout v. Watkins Livery & Undertaking Co.*, 130 S.W. 136, 148 Mo. App. 621.

**App. 1913.** A taxicab company in the business of transporting persons for hire from one part of the city to another, and holding itself out to carry one and all, is a common carrier of passengers.—*Van Hoefen v. Columbia Taxicab Co.*, 162 S.W. 694, 179 Mo. App. 591.

**App. 1922.** Where a taxicab company sent a taxicab in charge of a chauffeur to carry people for undertakers, and in so doing he was to some extent under direction of a funeral director but it did not surrender complete control, it was a common carrier as to a passenger therein, and was liable for a negligent injury to her, regardless of who paid for the service.—*Burke v. Shaw Transfer Co.*, 243 S. W. 449, 211 Mo. App. 353, certiorari quashed (Sup. 1923) *State ex rel. Shaw Transfer Co. v. Trimble*, 250 S.W. 384.

236. Duty to receive and transport passengers.

236 (1). In general.

**Sup. 1913.** A street car company acting as a public carrier for passengers is required to carry without discrimination all who present themselves.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**App. 1903.** The right to railway passenger carriage is not confined to persons who are physically sound, but is open, within a reasonable degree, to those ailing and infirm.—*Mathew v. Wabash R. Co.*, 78 S.W. 271, 115 Mo. App. 468, judgment affirmed (1905) *Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

**App. 1910.** A street railroad had the right to refuse to carry passengers on cars during their passage between the barns and the lines where they were to be put in service.—*Hermann v. St. Joseph Ry. Light, Heat & Power Co.*, 129 S.W. 414, 141 Mo. App. 147.

236 (2). Actions for failure to furnish transportation.

See explanation, page iii.

237. Who are passengers.

Commencement and termination of relation, see post, 247.

Persons other than passengers to whom carrier is liable for injuries, see post, 282.

238. — In general.

**Sup. 1895.** Without a contract for carriage on one part shown, and an acceptance on the part of the other, either express or implied, the relation of passenger and carrier can never exist.—*Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W. 331, 128 Mo. 64.

**Sup. 1900.** Where plaintiff, who was a newsboy, and in the habit of jumping on defendant's street cars to sell his papers, was injured by being struck by the tongue of a wagon, while selling papers on the footboard of a moving car, an instruction that the servants of defendant were bound to exercise a high degree of care to prevent injuring the plaintiff was properly refused, since he was not entitled to the rights of a passenger, and defendant was bound to exercise only ordinary care to prevent injuring him.—*Padgett v. Moll*, 60 S.W. 121, 159 Mo. 143, 52 L. R. A. 854, 81 Am. St. Rep. 347.

**Sup. 1906.** Where one engaged in moving the effects of a tenant from a building was, according to custom, riding on a freight

elevator, the relation of passenger and carrier existed between him and the owner of the building who was liable for injuries sustained by such person through the negligence of the operatives of the elevator.—*Orcutt v. Century Bldg. Co.*, 99 S.W. 1062, 201 Mo. 424, 8 L. R. A. (N. S.) 929.

**Sup. 1910.** A "passenger" is one who enters the vehicle of the carrier with the intention of paying, in money, the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point.—*Powell v. St. Louis & S. F. R. Co.*, 129 S.W. 963, 229 Mo. 246.

**Sup. 1915.** Where plaintiff entered the defendant's train by the right expressed on the face of a valid ticket, the relation of passenger and carrier existed between them.—*Ferguson v. Missouri Pac. Ry. Co.*, 177 S.W. 616.

**Sup. 1920.** Relation of passenger to carrier can only be created by contract, either express or implied.—*Banks v. Kansas City Rys. Co.*, 217 S.W. 488, 280 Mo. 227.

**Sup. 1928.** Husband boarding train to assist wife, who was passenger, *held* to have status of "invitee," if not passenger.—*Lewis v. Illinois Cent. R. Co.*, 3 S.W.(2d) 371, 319 Mo. 233.

**App. 1889.** In an action against a street railroad company for personal injuries, it appeared that plaintiff had dismounted from one of defendant's cars and was passing over a junction for the purpose of entering another car, it was defendant's custom, as plaintiff knew, that the junction should be kept free from cars passing in one direction until those passing in the other direction had left it. But, nevertheless, he was struck by a car going in the opposite direction to the one from which he had alighted. *Held*, that plaintiff was a passenger, at least in so far that he was entitled to protection while passing over the tracks.—*Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

**App. 1903.** The right of a person to carriage as a passenger on a street car rests on a contract, the essential ingredients of which are that the person must signify his intention to take passage either by words or conduct, and the car man must assent by words or conduct to his becoming a passenger.—*O'Mara v. St. Louis Transit Co.*, 76 S.W. 680, 102 Mo. App. 202.

**App. 1908.** The relation of passenger and carrier is dependent on the existence of a

contract, either express or implied.—*Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88, 134 Mo. App. 282.

**App. 1909.** If plaintiff got upon the platform of a street car when it had stopped to allow passengers to get aboard, with the intention of taking passage thereon, he was a passenger.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131, 138 Mo. App. 215.

**App. 1913.** Where a traveler enters a taxicab, which is the vehicle of a common carrier, the relation of passenger and carrier is established.—*Van Hoefen v. Columbia Taxicab Co.*, 162 S.W. 694, 179 Mo. App. 591.

**App. 1914.** One having and showing a ticket, when struck by the brakeman, denying his right to enter, *held* to be a passenger.—*Winston v. Lusk*, 172 S.W. 76, 186 Mo. App. 381.

**App. 1915.** To make one a passenger, undertaking on his part to travel in conveyance and acceptance of him by the carrier, *held* essential, but the acceptance may be implied from the circumstances.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

**App. 1925.** One who rides in elevator in a public office building is not a mere licensee or trespasser, but is a "passenger" for hire, and operator must exercise highest degree of care for his safety.—*Williams v. Short*, 268 S.W. 706, 219 Mo. App. 99, transferred from Supreme Court (1924) 263 S.W. 200.

**App. 1927.** Relationship of passenger and carrier depends upon existence of contract of carriage.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

### ⚡239. — Payment of fare.

Payment of fare to avoid ejection, see post, ⚡358.

**Sup. 1895.** A charge declaring one to be a passenger who attempted to get on a car, with the intention of paying his fare when called upon, without qualification as to the time, place, or manner of such attempt, is erroneous.—*Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W. 331, 128 Mo. 64.

**Sup. 1900.** A newsboy who jumps on a street car without signaling it to stop, for the purpose of selling papers, and jumping off again, is not a passenger so as to charge the company with special care to avoid injuring him, though he intended to pay fare if the conductor asked him; it appearing that the

conductor did not see him, and that the gripman, who had no authority to grant or refuse him permission to ride, tried to eject him.—*Raming v. Metropolitan St. Ry. Co.*, 57 S.W. 268, 157 Mo. 477.

**Sup. 1905.** In an action against a street railroad company where it appeared that defendant received plaintiff as a public carrier, and he was being carried as a passenger when he was injured, it was not error to instruct a finding for plaintiff if the jury found, among other facts, that defendant received plaintiff as a passenger to be carried for hire, though there was no evidence that plaintiff paid his fare, or that fare was demanded.—*Reynolds v. St. Louis Transit Co.*, 88 S.W. 50, 189 Mo. 408, 107 Am. St. Rep. 360.

**Sup. 1914.** Where a railroad company engaged an attorney to act as its local counsel, and gave him an annual pass in consideration of his agreement not to accept any cases against the company, the attorney, though using the pass on his own business, was a passenger, and the railroad company cannot escape liability for damages for his wrongful death under an agreement that it should not be liable for any injuries sustained by its negligence.—*Powell v. Union Pac. R. Co.*, 164 S.W. 628, 255 Mo. 420.

**Sup. 1919.** Where one boards a street car intending to become a passenger, the conductor making no objection, and thus impliedly accepting him as a passenger, it is immaterial that he has not paid his fare.—*Chapman v. Kansas City Rys. Co.*, 217 S.W. 290.

**App. 1900.** In an action by a passenger on defendant's train for personal injuries resulting from the negligent stopping of the train so as to throw plaintiff forward against a stove or woodbox, it is immaterial whether plaintiff at the time was riding free by the permission of the conductor, or whether he was authorized to permit her to ride free, since his failure to collect fare did not discharge defendant from its obligation to use due care toward her as a passenger.—*Dorsey v. Atchison, T. & S. F. Ry. Co.*, 83 Mo. App. 528.

**App. 1901.** A passenger is one who enters the vehicle of the carrier with the intention of paying in money the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

**App. 1902.** A person riding on a free pass over a railroad sustains the relation of passenger to the railroad company, and is entitled to sue for injuries occasioned by its negligence.—*Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**App. 1903.** Where a small child rides in a train in charge of an older person, for whom fare has been paid, no fare having been paid for the child because not required in such cases by the custom of the carrier, the child is a passenger.—*Rawlings v. Wabash R. Co.*, 71 S.W. 534, 97 Mo. App. 515.

Where a child was put on the train with an older sister without a ticket, it is reasonable to presume that the child was a passenger in good faith, especially as no objection was made to him as a passenger for want of prepayment of fare, and no demand and refusal to make such payment was shown.—*Id.*

**App. 1907.** Where one boards a railroad train without any intention to pay fare for his transportation, he does not become a passenger.—*Gates v. Quincy, O. & K. C. Ry. Co.*, 102 S.W. 50, 125 Mo. App. 334.

**App. 1910.** If one enters a car in good faith honestly, but mistakenly, believing in his ticket, he is a passenger from the time he tenders his fare, and is entitled to all of the indulgences which the law accords persons in that relation.—*Short v. St. Louis, & S. F. R. Co.*, 130 S.W. 488, 150 Mo. App. 359.

**App. 1913.** Where one takes passage on the conveyance of a common carrier with a purpose to beat his way, he is a mere trespasser, and is not entitled to the care and protection due a passenger.—*Fornoff v. Columbia Taxicab Co.*, 162 S.W. 699, 179 Mo. App. 620.

**App. 1915.** A passenger, who for a temporary purpose of his own enters into a Pullman car forming a part of the train without paying extra fare, remains a passenger, entitled to protection as such.—*Siegel v. Illinois Cent. R. Co.*, 172 S.W. 420, 186 Mo. App. 645.

**App. 1928.** Acceptance of any compensation from passenger for carriage creates relation of carrier and passenger.—*Alexander v. St. Louis-San Francisco Ry. Co.*, 2 S.W.(2d) 165, 221 Mo. App. 271.

#### 240. — Employés of carrier.

**Sup. 1865.** The second clause of Rev. Code 1855, p. 647, § 2, giving damages for the death of a passenger on a railroad, caused by

an injury resulting from a defect therein, applies only to those who stand strictly in the relation of passengers. And a person who has been employed on the railroad, and whose employment has not ceased, but who is temporarily out of work, is not necessarily a passenger when he rides in the baggage car on a private errand of his own and pays no fare, and is regarded by all parties as riding as employé.—*Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418.

**App. 1905.** A laborer employed to work on the tracks of a street car company, who travels on the company's car on a laborer's free pass to the place where he is ordered to work, is a passenger, entitled to the protection of a passenger.—*Haas v. St. Louis & S. Ry. Co.*, 90 S.W. 1155, 111 Mo. App. 706.

**App. 1905.** Employés using a freight elevator in the employer's building in going to and from their work, instead of the ample stairways provided, are not passengers.—*Kappes v. Brown Shoe Co.*, 90 S.W. 1158, 116 Mo. App. 154.

**App. 1907.** Plaintiff, who was employed by defendant railroad company as tool house foreman, was also required to assist in clearing away wrecks. A wreck having occurred, plaintiff, after finishing his labor, was directed by his foreman to take passage in the caboose of one of defendant's freight trains for headquarters, and while seated in such car he was injured in a rear-end collision. *Held*, that plaintiff while riding on the car was not a passenger, but still retained his relation as defendant's servant, as to whom defendant was only bound to exercise ordinary care.—*St. Clair v. St. Louis & San Francisco R. Co.*, 99 S.W. 775, 122 Mo. App. 519.

**←241. — Employés of others carried under contract with carrier.**

See post, ←307.

Postal employés while engaged in the performance of their duties on trains are passengers.

—**Sup. 1890.** *Mellor v. Missouri Pac. Ry. Co.*, 16 S.W. 840, 105 Mo. 455, 10 L. R. A. 36; (1927) *Scheipers v. Missouri Pac. R. Co.*, 298 S.W. 51;

**App. 1913.** *Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S.W. 327, 178 Mo. App. 579.

**Sup. 1894.** A porter of a palace car, whose duties are to collect fares and wait on passengers in such car, is entitled to the rights of a passenger, in respect of the careful run-

ning and management of the train.—*Jones v. St. Louis S. W. Ry. Co.*, 28 S.W. 883, 125 Mo. 666, 26 L. R. A. 718, 46 Am. St. Rep. 514.

**App. 1906.** The fact that one had a private arrangement between a railroad company and himself whereby he could ride on freight trains did not render the road's relation to him other than that of a common carrier.—*Gardner v. St. Louis & S. F. R. Co.*, 93 S.W. 917, 117 Mo. App. 138.

**App. 1913.** A railway mail clerk is a "passenger," within Rev. St. 1909, § 5425, giving a right of action for the death of a passenger caused by the negligent operation of railroad trains.—*Lasater v. St. Louis, I. M. & S. Ry. Co.*, 160 S.W. 818, 177 Mo. App. 534.

**←242. — Shippers and their agents accompanying shipment.**

Ejection, see post, ←356(2).

**App. 1901.** A carrier's contract to deliver plaintiff's cattle, and the taking of plaintiff aboard its cars as its passenger to accompany them to their destination, is an implied contract to deliver plaintiff safely.—*Jones v. St. Louis & S. F. R. Co.*, 89 Mo. App. 653.

**←243. — Conveyances and places not proper for passengers.**

See post, ←317.

Invitation or acquiescence of carrier's employés, see post, ←244.

**Sup. 1887.** The fact that the train in fault was a freight train, on which, under the rules of the company, passengers were not permitted to ride, does not render the person injured any the less a passenger, when, at the time he bought his ticket, he had no knowledge of such rules, and took the train under the instructions of an agent of the company, whose duty it was to direct passengers as to what trains they should enter.—*McGee v. Missouri Pac. Ry. Co.*, 4 S.W. 730, 92 Mo. 208, 1 Am. St. Rep. 706.

**Sup. 1889.** Though a train, which ran regularly on week days as a mixed freight and passenger, was running specially on Sunday, in charge of the usual conductor, and deceased could not of right have demanded to be carried as a passenger on that day, and neither paid nor was asked to pay fare, yet if the company, through its conductor, permitted deceased to ride, it assumed the same duties towards him as if he had been a regular passenger thereon.—*Wagner v. Missouri Pac. Ry. Co.*, 10 S.W. 486, 97 Mo. 512, 3 L. R. A. 156; *Zuendt v. Same*, 10 S.W. 491.

**Sup. 1891.** Plaintiff was injured by being thrown from defendant's street car while standing on the platform. *Held*, that while it was plaintiff's duty to place himself in a safe position on the car, and in remaining outside he assumed the risks, yet the fact of his riding on the platform did not sever his relation of passenger to defendant.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 17 S.W. 490, 103 Mo. 535.

**Sup. 1894.** Deceased, on a Sunday, took a seat in a caboose of a construction train on which the conductor had no authority to take passengers. It was made up as the regular week day trains, there being no other car for passengers, and was manned by the same crew. The advertisement in the papers only mentioned trains on week days and was silent as to trains on Sundays, but it was not shown that deceased had ever seen the advertisement. The road master testified that on the preceding Saturday one of the deceased, for himself and the others, who lived with him, asked permission of him to go on the Sunday train, but was told that passengers were prohibited on it. It was not shown that this refusal was communicated to the others. The conductor made no objection to the presence of deceased or others in the caboose, but when the train broke down, and it was necessary to drop the caboose, and go on with the flat and box cars only, he told them to get off, as there would be no way for them to get back; but, on their saying that they would take the chances of returning, he said no more; but at a station further on he told them that if they were back in 20 minutes they would not be left. No fare was tendered or asked. *Held*, that the evidence would not support a finding that they were passengers.—*Berry v. Missouri Pac. Ry. Co.*, 25 S.W. 229, 124 Mo. 223.

**App. 1896.** Plaintiff, having in his possession a ticket issued by defendant, came to defendant's station to take a train. When he arrived at the station he found the train standing at the platform. The steps and platform of the forward cars being crowded, plaintiff passed along the platform beside the train until he came to the last car but one. Entering this car, he also found it crowded, and thereupon took up a position on the platform of such car. *Held*, that plaintiff was a passenger.—*Choate v. Missouri Pac. Ry. Co.*, 67 Mo. App. 105.

**App. 1901.** Where, in an action against a carrier for injuries, the uncontradicted evidence shows that the party injured was standing on the back platform of the car, that while

handing the conductor a silver dollar for the purpose of paying his and another's fare, and while he was waiting for his change, he was by a sudden jerk of the car hurled therefrom into the street, the jury is properly instructed that such person was a passenger.—*Muth v. St. Louis & M. R. R. Co.*, 87 Mo. App. 422.

**244. — Invitation or acquiescence of carrier's employes.**

**Sup. 1880.** A person boarded a freight train on which passengers were allowed to be carried. He boarded the train without the permission or knowledge of the conductor; but the conductor, on becoming aware of the person's presence on the train, suffered him to remain. *Held*, that such person was entitled to the protection of a passenger.—*Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423.

**Sup. 1886.** Where deceased got on the car merely for the purpose of riding a short distance, and then jumping off, without any intention of paying his fare, and did not pay fare nor offer to pay it, he was not a passenger, even though the driver knew he was on the car, unless the driver consented to his being and remaining on.—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. 332.

Where it appears that deceased had not paid any fare at the time of the injury, yet if he was on the car with the knowledge and permission of defendant's employé in charge, then deceased was a passenger, and entitled to the same care and protection as if he had paid his fare.—*Id.*

**Sup. 1889.** In an action against a railroad company for injury alleged to have occurred while plaintiff was riding as passenger in defendant's caboose attached to a freight train with the consent of the conductor, it cannot be said that defendant owed plaintiff no duty, though he was there against defendant's rules.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409.

In an action for an injury against a railroad company, it appeared that plaintiff was injured while riding, with the consent of the conductor, in defendant's caboose attached to a freight train. *Held*, that the consent of the conductor, who had entire charge of the train, to plaintiff's riding thereon, was within the scope of his authority, so as to render defendant liable for the injury, if it resulted from the lack of ordinary care on the part of defendant's servants, though the conductor was forbidden to carry passengers on that

train, and though plaintiff was permitted to ride without payment of fare.—*Id.*

**Sup. 1802.** A boy six years old was invited on a street car by the conductor, and in alighting was injured because of the negligence of the latter. *Held*, that the company was liable in damages for such negligence, though the boy paid no fare.—*Buck v. People's Street-Railway & Electric Light & Power Co.*, 18 S.W. 1090, 108 Mo. 179, affirming judgment (1891) 46 Mo. App. 555.

Where a small boy becomes a free passenger on a street car, by consent of the driver in charge, the street railway company is bound to exercise towards him the same care as towards other passengers.—*Id.*

**Sup. 1906.** A contract by a brakeman of a freight train to allow a person to ride on the train in consideration of his rendering assistance in the loading and unloading of freight was outside the scope of the brakeman's authority, not binding the railroad company, and the person so riding was a trespasser.—*O'Donnell v. Kansas City, St. L. & C. R. Co.*, 95 S.W. 196, 197 Mo. 110, 114 Am. St. Rep. 753; *Doyle v. Same*, 95 S.W. 200.

**Sup. 1921.** One who was thrown to the pavement by the giving way of a handhold when boarding a street car after it left its usual stopping place, without invitation or knowledge on the part of the street car employees, and in the absence of a custom of so boarding, was not a passenger.—*Galloway v. Kansas City Rys. Co.*, 233 S.W. 385.

**App. 1881.** The mere fact that a carrier's servant violates his duty, and invites a person to ride free, will not operate to deprive the person so riding of an action for damages, if he is injured through such servant's negligence.—*Siegrist v. Arnot*, 10 Mo. App. 197.

**App. 1886.** A mother, who allowed her minor child to ride on a freight train, knowing that it was such and that it was contrary to the rules of the company to permit passengers to be carried on such train, could not recover for the child's death on the theory that the invitation to ride extended by a brakeman in the course of his employment.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 22 Mo. App. 60.

**App. 1891.** It is within the scope of the employment of the driver of a street car, who also acts as conductor, to receive passengers on the car and let them off; and a boy, rid-

ing on the car with such driver's consent and at his invitation, is a passenger, regardless of whether he is a passenger for hire or a free passenger.—*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1903.** It appearing that plaintiff was directed by the station agent to board the train, the fact that it was a freight train, not carrying passengers, did not make plaintiff a trespasser.—*Albin v. Chicago, R. I. & P. Ry. Co.*, 77 S.W. 153, 103 Mo. App. 308.

**App. 1907.** A boy boarding a street car with the consent of the gripman in charge thereof, who had no authority to grant the boy permission to ride on the car, is a trespasser, and not a passenger.—*Drogmund v. Metropolitan St. Ry. Co.*, 98 S.W. 1091, 122 Mo. App. 154.

**App. 1910.** Where a former employé of a railroad asked permission to ride on a freight train knowing that it was against the rules, and was refused and succeeded by collusion with the conductor in getting permission to ride on the freight train, he was a trespasser, and not a passenger.—*Youmans v. Wabash R. Co.*, 127 S.W. 595, 143 Mo. App. 393.

**App. 1912.** One who is permitted by the conductor to ride on the bumper of a street car because of its crowded condition is a passenger.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, 143 S.W. 865, 161 Mo. App. 515.

**App. 1912.** Plaintiff, boarding defendant's freight train, and giving the conductor an amount less than the regular fare, does not become a passenger.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1912.** One permitted by the engineer to ride on the back of the engine *held* not a lawful passenger without reward, within Civ. Code Cal. § 2096, but merely a trespasser, so that the defendant's only liability was to exercise ordinary care to prevent injuring him after discovery of his peril.—*Roberts v. Southern Pac. Co.*, 150 S.W. 717, 166 Mo. App. 639.

#### 245. — Pleading.

**Sup. 1889.** Where a person is permitted to take a caboose for the purpose of transportation by the consent of those agents in charge of the train, he is presumed to be there of right, and it is not necessary that he should set out the rules of the company and allege a compliance therewith.—*Whitehead*

v. St. Louis, I. M. & S Ry. Co., 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409.

247. Commencement and termination of relation.

**Sup. 1900.** An allegation in a petition against a street railway company for injuries, that plaintiff boarded a car with the intention of becoming a passenger, is not equivalent to an allegation that he was a passenger, since the law does not concern itself with mere intent not evidenced by an outward act.—*Raming v. Metropolitan St. Ry. Co.*, 57 S.W. 208, 157 Mo. 477.

**Sup. 1913.** Facts by which the relation of carrier and passenger was brought about need not be pleaded in a complaint for injuries to a passenger.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**App. 1909.** In a passenger's injury action plaintiff must allege that he was a passenger.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131, 138 Mo. App. 196.

246. — Evidence.

**Sup. 1906.** Where deceased, at the time of a collision, was in the coach used by defendant railroad for the purpose of transporting passengers, his residence being at a distant point where his family was, and the train having started to carry such passengers as were on to other points of destination along its line, the presumption was that deceased was lawfully in the coach.—*Anderson v. Missouri Pac. Ry. Co.*, 93 S.W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

**Sup. 1913.** Evidence of injuries to a person while attempting to board a car *held* sufficient to show acceptance of plaintiff's offer to become a passenger, though the place was not one where passengers were usually received.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**App. 1906.** In an action against a street railroad company for injuries received by an alleged passenger, evidence examined, and *held* insufficient to support a verdict because of the evidence showing that plaintiff was not a passenger at the time he was injured, but that he was injured while attempting to board a car while in motion.—*Lehnick v. Metropolitan St. Ry. Co.*, 94 S.W. 990, 118 Mo. App. 611.

**App. 1915.** Evidence *held* to show relation of carrier and passenger, though person thrown from passenger caboose of freight train and killed boarded the caboose at some distance from the station.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

247 (1). In general.

**Sup. 1913.** When one has availed himself of the facilities afforded by a carrier of passengers by entering upon the necessary and convenient use of them, the relation of carrier and passenger exists.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**Sup. 1914.** Where a contract between a railroad company and a shipper of stock and household goods required the shipper to ride at all times in the caboose, the shipper, when riding in the freight car contrary to the contract, was not a passenger and could not recover for injuries occasioned by an unusually hard coupling.—*Scrivner v. Missouri Pac. Ry. Co.*, 169 S.W. 83, 260 Mo. 421.

**Sup. 1920.** The act or intent of a person desiring to become a passenger is not sufficient to create the relation; some act of the company indicating an acceptance of the person as a passenger being necessary.—*Hanks v. Kansas City Rys. Co.*, 217 S.W. 488, 280 Mo. 227.

**Sup. 1922.** A contract between a street railway and an intending passenger is created where he indicates his purpose to take passage on a car, and the operator indicates his acceptance of the proposed passenger in some manner, such as stopping the car.—*Maloney v. United Rys. Co. of St. Louis*, 237 S.W. 509.

**App. 1910.** A passenger who buys a ticket at a station, and who before reaching it notified the conductor of his intention to go beyond it, does not cease to be a passenger, where he leaves the train at the station to comply with the rule of the carrier to buy a ticket before taking passage on a train and with the request of the conductor that he purchase a ticket at the station.—*Harkless v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 29, 151 Mo. App. 463.

**App. 1916.** A customer in a store, invited to use the elevator to visit the desired floor, is a passenger upon stepping forward to enter the cage.—*Anderson v. American Sash & Door Co.*, 182 S.W. 819.

**App. 1919.** That an aged and infirm passenger did not get off a railway coach with the other passengers, but waited five minutes for assistance before attempting to alight alone, did not deprive him of his status as a passenger.—*Turner v. Wabash R. Co.*, 211 S.W. 101.

**App. 1927.** Relationship of "carrier and passenger" begins when prospective passenger is accepted and puts himself within carrier's control in proper place for transportation with intention to use transportation facilities.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

Relationship of passenger and carrier may be implied from circumstances without necessity of formal act of presentment to carrier or acceptance.—*Id.*

#### ←247 (2). Going to or awaiting train.

**Sup. 1920.** Person who, intending to go east on elevated railway, mounted stairway to station for use of west-going passengers, and was injured by west-bound train while crossing platform to station for use of east-going passengers, for which there was a separate stairway, was not a passenger at time of injury, having been in no position to be accepted as a passenger at such time.—*Banks v. Kansas City Rys. Co.*, 217 S.W. 488, 280 Mo. 227.

When one is in a station or on a platform, intending to take passage, and a street car comes up and stops at that station, or its platform, there has been an acceptance of the passenger, and an implied contract for carriage, thus creating the relation of passenger and carrier.—*Id.*

**App. 1903.** Where plaintiff was at defendant's depot for the purpose of taking a train, and, though he had purchased no ticket, was crossing an intervening track for the purpose of boarding a train with the intention of paying his fare thereon, he was entitled to the measure of care due a passenger.—*Albin v. Chicago, R. I. & P. Ry. Co.*, 77 S.W. 153, 103 Mo. App. 308.

**App. 1905.** Where plaintiff, with certain other excursionists, engaged an ordinary passenger car for transportation to another city and return, with the right to use the car while on the switch, awaiting return, plaintiff was not a passenger in going to the car, for her own accommodation, as it was standing on the switch some time before it was due to leave on its return trip.—*Archer v. Union Pac. Ry. Co.*, 85 S.W. 934, 110 Mo. App. 349.

**App. 1914.** Where plaintiff was assaulted by defendants' ticket agent when endeavoring to induce him to return plaintiff's change for ticket purchased, plaintiff was a passenger to whom the carrier owed a duty of protection from, unlawful assaults by em-

ployés.—*Bledsoe v. West*, 171 S.W. 622, 186 Mo. App. 460.

**App. 1918.** One who purchases a ticket at 11 a. m. for a train leaving at 6 p. m., who intends to stay in the station to keep warm, is not a passenger, and may be ejected.—*Thomas v. Bush*, 200 S.W. 301.

**App. 1923.** Though relation of carrier and passenger is contractual, if plaintiff assumed position immediately in rear of other passengers boarding street car, in ample time to board it and give conductor an opportunity to see him with intention of becoming a passenger, the contractual relation was created, and he became entitled to all rights of passenger, though he was not at usual stopping place when car stopped.—*Detchemendy v. Wells*, 253 S.W. 150.

**App. 1924.** Plaintiff, who was to be transported free of charge in caboose as caretaker of his cattle shipped over defendant's line, *held* to have become passenger as soon as plaintiff arrived at depot ready to board train and before he started to go to caboose for that purpose.—*Edmondson v. Missouri Pac. R. Co.*, 264 S.W. 470.

**App. 1927.** Person who went on railroad station to take passage on train for which he had ticket in his possession *held* "passenger."—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

#### ←247 (3). Signaling car or train to stop and boarding same.

**Sup. 1895.** The rear car of an electric railway train was just passing over the further crosswalk at a street crossing, at which the city ordinance required it to stop for passengers, and was running three miles an hour, when plaintiff came on the street. Plaintiff, intending to board the train, ran towards the motor car, but was not seen by the conductor until within 10 feet of the car. There was no slacking of speed or other act showing any intention on the part of the conductor or motorman to accept him as a passenger. *Held*, that by his attempt to board the train he did not become a passenger so as to require of the railway company the highest degree of care to avoid injuring him.—*Schepers v. Union Depot R. Co.*, 29 S.W. 712, 126 Mo. 665.

**Sup. 1898.** An electric car on an elevated railroad had stopped at a station to receive passengers. While it was standing still deceased stepped on the step of the car for the purpose of getting on the car as a passen-



ger. *Held*, that he was entitled to all the protection of a passenger, and hence defendant was negligent in suddenly starting the car before deceased could enter it.—*Barth v. Kansas City Elevated Ry. Co.*, 44 S.W. 778, 142 Mo. 535.

**Sup. 1905.** One who attempts to enter a street car for the purpose of taking passage, when it stopped for him on signal, is a passenger, though he saw no conductor or motorman on the car.—*Devoy v. St. Louis Transit Co.*, 91 S.W. 140, 192 Mo. 197.

**Sup. 1912.** A person in the act of getting upon a street car is a passenger.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

**Sup. 1913.** A street car company may extend permission to become a passenger in any way calculated to notify the passenger of that fact, without bringing its car to a dead stop.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

One who attempts to enter a car which has been slowed down by the motorman upon his signal to a speed of two miles per hour becomes a passenger.—*Id.*

**Sup. 1917.** It is not necessary that person should have hold of rail or have foot on step of car to be regarded as "passenger," but will be so regarded while carefully attempting to step upon platform.—*Gunn v. United Rys. Co. of St. Louis*, 193 S.W. 814, 270 Mo. 517, L. R. A. 1917D, 1131.

**Sup. 1917.** If there is definite response by motorman to signal to stop at place where cars do not usually stop, and car is slowed down, so that attempt to board it may safely be made, and is made, one becomes passenger.—*Vrooman v. Harvey*, 197 S.W. 118.

If signal is given, and motorman sees it and stops, it is presumed that stopping is in answer to signal, that invitation is given, and contract complete.—*Id.*

**Sup. 1919.** Where one intending to board a street car was permitted to enter the car, intending to pay his fare and be carried, such person was a passenger, notwithstanding that subsequently the conductor informed him that the car was going to the barn, and kicked a bundle which he carried off the car platform.—*Chapman v. Kansas City Rys. Co.*, 217 S.W. 290.

**Sup. 1920.** One who has a ticket for transportation by train, and is waiting at the

railway station to take passage on the train, and is injured while attempting to board train, is a "passenger" to whom the railway employes owe duty of high degree of care.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**Sup. 1927.** Contract of carriage was complete when intending passenger accepted conductor's invitation to board car standing with doors open.—*Erny v. Wells*, 293 S.W. 119, 316 Mo. 798.

**App. 1891.** Where a freight train which stopped at flag stations on signals in order to take on passengers was so signaled to stop, and plaintiff endeavored to board the train while it was in motion, the train having slowed down, the relation of passenger and carrier existed.—*Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

**App. 1903.** Where one standing at the right place to take passage on a street car signals the motorman, telling him he wants to get on, and in obedience thereto it is stopped or slowed down to let him on, and he attempts to board it, while doing which the car is started forward quickly, injuring him, his rights are those of a passenger, though he was negligent in getting on.—*O'Mara v. St. Louis Transit Co.*, 76 S.W. 680, 102 Mo. App. 202.

**App. 1904.** A person becomes a passenger on a street car by a contract, express or implied. He may become one in attempting to get on a car at a place provided for that purpose and where people are expected to take passage, though his attempt fails; but a man does not become a passenger by making such an attempt at a place where he is not expected and when the carmen are ignorant of his presence.—*McCarty v. St. Louis & S. Ry. Co.*, 80 S.W. 7, 105 Mo. App. 596.

**App. 1904.** A passenger in alighting from a street car had put her feet on the surface of the ground, but while she stood there, before she had taken a step, and while she was still holding on to the car, the soil crumbled under her feet and let her into a ditch. *Held*, that the relation of passenger and carrier was still intact when she fell, and that the liability of the street railroad company was to be tested by the degree of high care required of carriers of passengers.—*MacDonald v. St. Louis Transit Co.*, 83 S.W. 1001, 108 Mo. App. 374.

**App. 1905.** Where persons are lined up in the attitude of waiting for a car on a plat-

form constructed by a street railway company for convenience of passengers in getting on and off cars, this is notice to a motorman of their desire to board his car; and, he having turned off the power, applied the brake, and checked the car for the apparent purpose of taking on passengers, one of such persons has the right to assume that he is invited to board the car, so that, in his attempt to do so, the relation of passenger and carrier exists between him and the company, though the power had been turned off and the brake applied for some other purpose, not communicated to those waiting for the car.—*Spencer v. St. Louis Transit Co.*, 86 S.W. 593, 111 Mo. App. 653.

**App. 1911.** Where a hotel elevator for the accommodation of guests stops at a floor and the door is opened for the reception of passengers, the relation of carrier and passenger begins the moment the latter starts to enter the car and brings himself within the range of its possible activities.—*Chambers v. Kupper-Benson Hotel Co.*, 134 S.W. 45, 154 Mo. App. 249.

A guest at a hotel approached the passenger elevator with the intention, recognized by the operator, of becoming a passenger. The operator, who had started up, stopped and returned to the floor for the sole purpose of receiving the guest and his companions. The elevator door was not entirely closed when the descent began and the operator opened it and stopped the car at the proper place to admit passengers. *Held*, that the relation of carrier and passenger began when the car was returned and stopped at the floor and when the elevator door was opened by the operator and the guest started to enter in front of the door.—*Id.*

**App. 1911.** The attempt of one to board a slowly moving street car after it had left the usual stopping place, and was starting to run over a viaduct used exclusively for street car traffic, did not create the relation of passenger and carrier in the absence of any invitation extended to him by the company to board the car, and the company owed him no other duty than that of using ordinary care to avoid injuring him after it discovered or should have known his peril.—*Mathews v. Metropolitan St. Ry. Co.*, 137 S.W. 1003, 150 Mo. App. 715.

**App. 1912.** While one may not create the relation of passenger and carrier between himself and a street railway company by merely attempting to board a moving car, the rela-

tion may be found to have been created by plaintiff having signaled an approaching car, and by the car having immediately slowed down until it practically stopped at its usual stopping place, where he attempted to board it.—*Palfrey v. United Rys. Co. of St. Louis*, 142 S.W. 773, 162 Mo. App. 470.

**App. 1912.** One becomes a street car passenger the instant he starts to board a car, and it then becomes the duty of the operators of the car not to start it until he has been given a reasonable opportunity to reach a place of comparative safety.—*Conway v. Metropolitan St. Ry. Co.*, 142 S.W. 1101, 161 Mo. App. 81.

**App. 1913.** A street car company impliedly invites persons at a regular stopping place to enter the car when it stops, and the relation of carrier and passenger begins at the time such person indicates his acceptance of such invitation.—*Fields v. Metropolitan St. Ry. Co.*, 155 S.W. 845, 169 Mo. App. 624.

**App. 1914.** One who, at an elevated station where the street railway company maintained a sign warning persons not to board moving cars, attempting to board a car in motion, the gates of which were partly shut, is not a passenger.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

**App. 1915.** If a carrier signifies a willingness to receive a passenger at a particular point, and the passenger undertakes to board the train there, there is an invitation and acceptance of him as a passenger.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

Where a carrier had long received and permitted passengers to debark from passenger caboose of freight train wherever it happened to stop, *held*, that such place was not an improper place to board the train.—*Id.*

Where the holder of a ticket boards a train at the usual place for the reception of passengers, the relation of carrier and passenger exists, though she has not entered the car.—*Id.*

**App. 1928.** One boarding bus, with intent to secure passage, *held* passenger, irrespective of regular stopping place.—*Hayward v. People's Motorbus Co. of St. Louis*, 1 S.W. (2d) 252.

—247 (4). **Reaching destination and leaving train or carrier's premises.**

**Sup. 1896.** A passenger, after alighting at his destination, ceases to be a passenger when he undertakes to cross the train to the

opposite side from the depot, to see the engineer on private business, and cannot recover for injuries caused by his striking a box on the baggage-car platform over which he attempted to recross.—*Hendrick v. Chicago & A. R. Co.*, 38 S.W. 297, 136 Mo. 548.

**Sup. 1906.** A passenger who has purchased a ticket to a certain point, but who, on reaching such point, decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey.—*Anderson v. Missouri Pac. Ry. Co.*, 93 S.W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

**Sup. 1924.** A passenger remains such until he has alighted from carrier's vehicle, and while alighting carrier owes him duty of a very high degree of care.—*Lackey v. Missouri & K. I. Ry. Co.*, 264 S.W. 807, 305 Mo. 260.

**App. 1903.** Where, as a passenger was descending from a street car, the conductor pushed him off, and at the same moment called on a policeman to arrest him, he had not ceased to be a passenger when the order to the policeman was given, so as to release the company from liability if the arrest was wrongful.—*Grayson v. St. Louis Transit Co.*, 71 S.W. 730, 100 Mo. App. 60.

**App. 1903.** A passenger's contract for carriage on an electric car covers the period needed for safely alighting therefrom, during which she is entitled to be shown the highest degree of care.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

**App. 1905.** Defendant's street car conductor committed an unprovoked assault on plaintiff, who was an old man, as he was endeavoring to alight, and pushed or threw him from the car. Plaintiff's umbrella remained on the platform, and when he attempted to get it the conductor kicked him in the groin, whereupon plaintiff hit the conductor with the umbrella, and the latter then followed plaintiff to the street and beat him. *Held*, that the assault was continuous, and that the relation of carrier and passenger had not entirely ceased when plaintiff was kicked.—*Flynn v. St. Louis Transit Co.*, 87 S.W. 560, 113 Mo. App. 185.

**App. 1905.** The relation of carrier and passenger continues until the time the latter leaves the train, so that it is the duty of the carrier, not only to safely carry the passenger, but, when his destination is reached, to keep the train stationary while he is alighting.—

*Nelson v. Metropolitan St. Ry. Co.*, 88 S.W. 1119, 113 Mo. App. 702.

**App. 1912.** Where a passenger alighted from a train, and left the depot platform in safety, after checking his baggage in the depot and obtaining a check therefor, the relation of carrier and passenger terminated, and the carrier became a warehouseman with the duty to allow the passenger access to the depot to remove his baggage and to see that no obstructions were in or on the station or platform.—*Reynolds v. St. Louis Southwestern Ry. Co.*, 142 S.W. 1097, 162 Mo. App. 618.

**App. 1913.** The relation of carrier and passenger continues until the passenger has alighted from the car, and therefore the obligation of high care obtains until the passenger has left the carrier's vehicle in safety.—*Craig v. United Rys. Co. of St. Louis*, 158 S.W. 390, 175 Mo. App. 616.

**App. 1913.** Where the servants of a taxicab company held a passenger prisoner even after he had alighted, and refused to allow him to remove his grip until he had paid an excessive fare, the relation of passenger and carrier existed during the entire time.—*Van Hoefen v. Columbia Taxicab Co.*, 162 S.W. 694, 179 Mo. App. 591.

**App. 1913.** Where a passenger in the taxicab of a common carrier enters a saloon to procure change to pay the driver, the relation of passenger and carrier continues until the driver is paid off, and the carrier is liable for the acts of its driver in assaulting the passenger while he is attempting to procure change.—*Fornoff v. Columbia Taxicab Co.*, 162 S.W. 699, 179 Mo. App. 620.

**App. 1919.** Where passenger, after leaving train and while on platform, was requested by brakeman to help in unloading of heavy barrel from car, railroad was not liable, by reason of the relation of carrier and passenger, for injuries sustained while giving such assistance.—*Shaffer v. St. Louis & S. F. Ry. Co.*, 208 S.W. 145, 201 Mo. App. 107.

#### 247 (5). Changing cars or leaving train temporarily.

**App. 1910.** A temporary departure by a passenger from the train for any good or reasonable cause, without intent to abandon transportation, does not end the relation of carrier and passenger.—*Austin v. St. Louis & S. F. R. Co.*, 130 S.W. 385, 149 Mo. App. 397.

A passenger on a freight train who, at the request of the conductor, alighted from the car

boose to assist in the saving of property endangered by a wreck of a part of the train did not thereby cease to be a passenger, and the carrier owed him the duty to protect him from injury while alighting and of informing him of the dangers of his act, and where the conductor invited the passenger to leave the caboose while in a dangerous position known to him and unknown to the passenger, and the passenger was injured in consequence, the carrier was liable.—*Id.*

**App. 1913.** Where a passenger in the taxicab of a common carrier entered a saloon to procure change to pay the chauffeur for that part of the journey which had already been made, the relation of carrier and passenger still existed; the passenger not yet having reached his destination.—*Fornoff v. Columbia Taxicab Co.*, 162 S.W. 699, 179 Mo. App. 620.

**App. 1914.** Where plaintiff rode to the end of a street car line, and the conductor removed the trolley, rendering the car dark, plaintiff did not lose his status as a passenger because he stopped on the platform until the car was relighted.—*Sterneman v. Springfield Traction Co.*, 163 S.W. 258, 178 Mo. App. 64.

#### —248. Rules of carrier.

As to taking up passengers, see post, —287.

**Sup. 1872.** A regulation by a railroad company forbidding conductors from passing any one on half-fare tickets, unless those exhibiting them should carry a permit from the proper officer of the road to travel in that manner, *held* to be reasonable.—*Goetz v. Hannibal & St. J. R. Co.*, 40 Mo. 472.

**App. 1890.** In an action for personal injuries received by plaintiff while riding on defendant's train in charge of live stock, it appeared by plaintiff's evidence that the stock was shipped upon a written contract contained on a printed form used by defendant, and that such contract was signed by plaintiff. The paper was headed in large print, "Instructions to agents and shippers." Among such instructions in plain legible type were the following: "For rules governing the passage of men in charge of live stock, see special instructions. Parties so passing must ride in the caboose attached to the train carrying stock." *Held*, that it was immaterial whether the instruction to agents and shippers was formally a part of the contract. It was a reasonable regulation of the contract, of which plaintiff was bound to take notice.—*Tuley v. Chicago, B. & Q. Ry. Co.*, 41 Mo. App. 432.

**App. 1909.** A rule requiring a passenger either to produce a ticket or pay cash fare is reasonable.—*Bolles v. Kansas City Southern Ry. Co.*, 115 S.W. 459. See Carriers, —255 in this Digest.

**App. 1910.** A passenger is entitled to reasonable opportunity to comply with a carrier's regulation.—*Cathey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

#### (B) FARES, TICKETS, AND SPECIAL CONTRACTS.

Contributory negligence of person accompanying shipment of live stock as affected by provisions of contract, see post, —331(3).

Ejection of passenger holding transfer to connecting line, see post, —373.

Failure to procure ticket as ground for ejection, see post, —354—358.

Limitation of liability for loss of baggage, see post, —405(3).

Limitation of liability for personal injuries, see ante, —181½ and post, —307.

Payment of fare as creating relation of carrier and passenger, see ante, —239.

Payment of fare to avoid ejection, see post, —358.

Performance of contract, see post, —262—279.

Regulation as to sale of tickets, see ante, —1—22.

Rules of carriers, see ante, —248.

#### —248½. Right of carrier to compensation.

**Sup. 1893.** The declaration of Const. 1875, art. 12, § 14, that railways within the state are public highways does not authorize one to ride on a train without payment of fare, and in defiance of the regulations of the company.—*Farber v. Missouri Pac. Ry. Co.*, 22 S.W. 631, 116 Mo. 81, 20 L. R. A. 350.

#### —249. Amount of fare.

**App. 1910.** A "reduced rate" given by a carrier must be one fixed lower than another rate which is offered to the public, and the sale of a return trip ticket at a price less than two single trip fares is not a reduced rate.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

#### —250. Payment of fare.

See explanation, page iii.

#### —251. Acts and statements of agents or employees.

**App. 1910.** Where a carrier sold plaintiff a ticket to a certain point, the agent stat-

ing that the company sold no tickets to a transfer point further on where plaintiff desired to go, but that plaintiff would be carried to the transfer point and allowed to alight there, and he was permitted by the conductor to continue on his journey as a passenger until he reached such transfer point without additional fare, there was a contract of carriage to such transfer point.—*Cornell v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 1021, 143 Mo. App. 598.

In making a contract of carriage, a ticket agent is the "carrier corporation," as is the conductor on the train in carrying the contract out.—*Id.*

252. Sale of tickets.

Damages, see post, 382(6).

**App. 1885.** Where a railroad company runs an ample number of passenger trains, and furnishes agents and depot facilities for the purchase of tickets for transportation on such trains, it is not the duty of the company to furnish the same facilities for the purchase of tickets for passage on its freight trains, though it occasionally permits passengers to ride on freight trains, but requires that passengers on such trains shall first provide themselves with tickets.—*Jones v. Wabush, St. L. & P. Ry. Co.*, 17 Mo. App. 158.

253. Nature and effect of ticket in general.

253 (1). In general.

**App. 1905.** Where plaintiff bought a ticket to a certain station in a certain city, and her baggage was checked to the same place, and both she and it were deposited by the railroad at that place, and there was no evidence that the railroad's line ended elsewhere, the contract of carriage would be deemed a through one to that station and city.—*Hubbard v. Mobile & O. Ry. Co.*, 87 S.W. 52, 112 Mo. App. 459.

**App. 1910.** A railroad ticket for transportation, paid for at the ordinary rate, is not a contract within itself, but a mere evidence of contract, which the law creates and which lies behind the ticket.—*Cornell v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 1021, 143 Mo. App. 598.

253 (2). Transferability.

**Sup. 1903.** It is competent for a railroad to issue special tickets, based on reduced rates, and to make them nontransferable, and valid only in the hands of the original purchaser; and such tickets may be limited or unlimited as to time or occasion, and the original pur-

chaser thereof cannot assign or transfer them, or any rights whatever thereunder, to any third person.—*Schubach v. McDonald*, 78 S. W. 1020, 179 Mo. 163, 65 L. R. A. 136, 101 Am. St. Rep. 452, error dismissed 25 S. Ct. 797, 196 U. S. 644, 49 L. Ed. 632.

253½. Passes.

Ejection of passengers, see post, 356(2).

Interstate carriers, see ante, 32(1).

Limitation of liability, see post, 307(2).

**Sup. 1924.** Free railway pass given to minor as one of family of carrier's employee, held mere gratuity without consideration.—*Pinnell v. St. Louis-San Francisco Ry. Co.*, 263 S.W. 182, 41 A. L. R. 1092, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 623, 69 L. Ed. 473.

**App. 1908.** Where a drover's pass on which plaintiff claimed a right to ride recited that it was issued, subject to "the following contract," the first provision of which declared that it was good only for continuous train passage commencing on the date punched in the margin, and plaintiff did not begin his journey until the day succeeding that date, the ticket did not entitle plaintiff to ride thereon.—*Randolph v. Quincey, O. & K. C. R. Co.*, 107 S.W. 1029, 129 Mo. App. 1.

Where plaintiff was given a drover's pass covering return transportation, it would be presumed, in the absence of evidence to the contrary, that plaintiff could read, and it was his duty to read the pass and make himself acquainted with and comply with its conditions.—*Id.*

**App. 1926.** Melon shipper, injured while closing peddling car door, held not to have violated Rev. St. 1919, § 9927, by shipping one of two cars shipped in name of another who accompanied it; railroad agent having had knowledge of ownership of shipment.—*Rooney v. St. Louis-San Francisco Ry. Co.*, 286 S.W. 153, 220 Mo. App. 273.

254. Conditions in tickets.

254 (1). In general.

**Sup. 1905.** A provision in a railroad ticket that, in case of an error on the part of the carrier's agent, or a question of doubt between the holder and the conductor, the passenger should pay the conductor's claim, take his receipt, and report to the general passenger agent, was unreasonable and void.—*Cherry v. Chicago & A. R. Co.*, 90 S.W. 381, 191 Mo. 480, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

**Sup. 1914.** That a contract between a railroad company and a shipper of household goods and live stock required the shipper to feed and water the stock does not avoid other provisions of the contract requiring the shipper to ride in the caboose at all times the train is in motion.—*Scrivner v. Missouri Pac. Ry. Co.*, 169 S.W. 83, 200 Mo. 421.

**App. 1884.** A person purchased a limited ticket from Council Bluffs to Chicago. The conductor of the train took up his ticket and gave to him a train check, which provided that it was good only for continuous passage on regular passenger trains, and must be used before the specified time. This check was sold to a broker at St. Louis and purchased from the broker by plaintiff. *Held*, that plaintiff was not entitled to passage from St. Louis to Chicago; the condition as to continuous passage referring to a continuous passage of the passenger to whom it was issued.—*Walker v. Wabash, St. L. & P. Ry. Co.*, 15 Mo. App. 333.

**App. 1909.** Where a passenger pays full fare for a ticket, it is not regarded as the contract between him and the carrier, but as a mere token thereof, and in such cases the law itself fixes the terms of the contract which controls the relationship of the parties; but, where the ticket purports on its face to express a contract, and its conditions and restrictions, at variance with the conditions the law would impose, are supported by a consideration, the ticket itself is the contract of transportation, and its reasonable and lawful conditions and restrictions will be enforced by the courts.—*Leyser v. Chicago, B. & Q. R. Co.*, 119 S.W. 1068, 138 Mo. App. 34.

The third clause in a return ticket over different lines required the purchaser to begin the return trip on the date stamped on it by the validating agent, and to keep on traveling till he arrived at his destination, allowing three days for the trip, which it appeared would be consumed in travelling over the route called for. Another clause provided that it was subject to the stop-over regulations of the line over which it read. *Held*, that this meant that the other clauses of the contract, including the third, were subordinated, and made subject to it; and, by complying with the stop-over regulations in such case, the purchaser had the right to stop off on his return trip, and would not be required to complete the journey in three days.—*Id.*

⚡254 (2). Time limitation in general.

**App. 1882.** Where a limited ticket is issued "not good for passage after" a certain

number of days from its date, the passenger need not have completed his journey by that date. It is sufficient that he has commenced it.—*Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463.

⚡254 (3). Effect of expiration of time limit in general.

**Sup. 1905.** The condition in a railroad ticket sold at a reduced rate that it will not be good for return passage unless the holder identifies himself as the original purchaser to the ticket agent at destination on any day within the limit of 21 days from date of sale, and that it will then be good for continuous return passage, which shall be commenced on date of execution, as punched in the right-hand margin, is binding, so that the purchaser having, on arriving at her destination, two days after purchase of the ticket, been identified by the ticket agent at that place, who then attested her signature and dated it as of that date, the ticket is not good for a return passage commencing several days thereafter, though within the limit of 21 days.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

⚡254 (4). Fault of carrier and unreasonable limitations.

*See explanation, page iii.*

⚡254 (5). Signing and stamping by agent.

*See explanation, page iii.*

⚡254 (6). Notice and acceptance of conditions.

**Sup. 1905.** The fact that one buying what she knew was a special-rate railroad ticket did not read it does not relieve her of the effect of a stipulation, plainly printed on its face, that return passage should be commenced on the date that she was identified, and the ticket was stamped and punched for return passage.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

**App. 1883.** A purchaser of a special excursion ticket, containing stipulations requiring the purchaser to identify himself as the original purchaser, and signed by the original purchaser and the agent of the company selling the ticket, is estopped from denying that he did not know the contents of the ticket.—*Cloud v. St. Louis, I. M. & S. Ry. Co.*, 14 Mo. App. 136.

⚡254 (7). Forfeiture and remedies in enforcement thereof.

**Sup. 1903.** If any person buys a special nontransferable ticket, and sells it to a third person, to be used by him, the railroad can

invoke the aid of equity to cancel the contract because of the fraud thus perpetrated; or, if the ticket is used by another, it can sue for damages for the breach of the contract.—*Schubach v. McDonald*, 78 S.W. 1020, 179 Mo. 163, 65 L. R. A. 136, 101 Am. St. Rep. 452, error dismissed 25 S. Ct. 797, 196 U. S. 644, 49 L. Ed. 632.

**Sup. 1905.** A limited ticket provided that it must be used for a continuous passage "going," commencing date of sale as stamped on back, and provided that before returning the passenger must have his return ticket validated at the starting point, and it would then be valid for passage to arrive at original starting point not later than the extreme limit indicated by punch mark on the margin. The ticket was issued from Fresno, Cal., to Philadelphia, limited to August 11, 1900, and contained a further provision that the ticket issued on exchange order from Eastern Gateway to Philadelphia and return will be good for continuous passage to leave Philadelphia not later than June 26, 1900. *Held* that, as a continuous trip returning would not take from June 26th to August 11th, the holder of the ticket did not forfeit his entire ticket by not pursuing a continuous journey returning.—*Cherry v. Chicago & A. R. Co.*, 90 S.W. 381, 191 Mo. 489, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

254 (8). Waiver of conditions.

See explanation, page iii.

255. Exhibition and surrender of tickets.

**App. 1892.** A conductor must have proper evidence of the right of the passenger to ride, and the passenger must produce a proper ticket, or else pay the conductor for his carriage.—*Woods v. Metropolitan St. Ry. Co.*, 48 Mo. App. 125.

**App. 1909.** A rule requiring a passenger either to produce a ticket or pay cash fare is reasonable.—*Bolles v. Kansas City Southern Ry. Co.*, 115 S.W. 459, 134 Mo. App. 696.

**App. 1910.** Regulations of a carrier of passengers, such as requiring exhibition of tickets before entrance to coaches, must not only be reasonable in themselves, but they must be administered in a reasonable manner, and so as to inflict no unnecessary injury or inconvenience upon passengers.—*Cathey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

256. Extra fares.

See explanation, page iii.

257. Excessive and unauthorized charges.

See explanation, page iii.

258. Special contracts for transportation.

**Sup. 1874.** Where a written contract for the transportation of troops did not expressly provide for their subsistence, *held*, that parol evidence was admissible to establish a subsequent oral agreement fixing a price therefor.—*Van Studdiford v. Hazlett*, 56 Mo. 322, 328.

**Sup. 1905.** Preparatory to a national convention, defendant issued a circular letter to ticket agents, providing for a final return limit of June 27, 1900, without stop-over. Thereafter the chairman of a passenger association, to which defendant belonged, issued a consultation letter to all its members, informing them that a certain railroad company intended to issue convention tickets good for 60 days, and called for a vote, whereupon defendant's general passenger agent informed the secretary of the association that he might record the vote of defendant with the majority. Some of the members objected to the 60-day limit, but thereafter withdrew their objection, whereupon such secretary issued a circular letter announcing that the 60-day proposition had been adopted. *Held*, that defendant should be held to have consented to such proposition, without the necessity of a resubmission after the withdrawal of the objections.—*Cherry v. Chicago & A. R. Co.*, 90 S.W. 381, 191 Mo. 489, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

Where defendant carrier agreed to a proposition for the issuance of 60-day convention excursion tickets, and permitted such tickets to be issued by agents to the public generally, it could not refuse to accept a ticket so issued because it had not filed its acceptance thereof with the Interstate Commerce Commission, as required by law.—*Id.*

**App. 1896.** A contract by a street railroad company to carry a picnic party "round" to a certain point without change is not a contract to carry them there and back without change.—*Dillon v. Lindell Ry. Co.*, 64 Mo. App. 418.

**App. 1913.** Under Rev. St. 1909, § 3122, requiring a carrier of live stock to pass the shipper in consideration of the latter giving the stock necessary care, and releasing the carrier from liability therefor, a shipper need not enter into additional obligations to obtain a pass, and any additional conditions in the

pass are without force.—*Chorn v. Missouri, K. & T. Ry. Co.*, 153 S.W. 1060, 168 Mo. App. 518.

**App. 1919.** Where defendants, explaining that they were getting up an excursion for certain societies, induced plaintiff interstate carrier to publish a special tariff at a certain rate providing 400 passengers were transported, and deposited \$50 as evidence of their good faith, they are not liable for any deficiency arising under the tariff, in the absence of a contract by them guaranteeing the number of passengers carried.—*St. Louis Electric Terminal Ry. Co. v. Buechel*, 213 S.W. 177.

←259. **Transportation by connecting carriers.**

Duties of connecting carriers in performance of contract, see post, ←270.

**Sup. 1905.** Defendant sold a ticket over its road and other roads to C. and return, providing that in selling the ticket it acted as agent, and was not responsible beyond its line, and that the return passage must be commenced the day that the passenger identified herself to the ticket agent at C., and he punched the ticket. *Held*, that the ticket agent at C. was not the agent of defendant, so as to make it responsible for his mistake in punching it on her arrival, and telling her that she could use it on a later day.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

**Sup. 1905.** Where an agent of a connecting line, who issued a through ticket to plaintiff over defendant's railroad, had previously so acted, and his action in limiting such tickets had always been acceded to by defendant in order to obtain a share of the business, and defendant's proportionate part of the cost of plaintiff's ticket must have been received by defendant, and was retained prior to plaintiff's offer of the return portion of his ticket for transportation within the time limit specified therein, defendant was bound by the act of such issuing agent in limiting the ticket, whether he was a general or a mere special agent.—*Cherry v. Chicago & A. R. Co.*, 90 S.W. 381, 191 Mo. 489, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

**App. 1877.** Railroad corporations have authority to contract for the transportation of passengers and goods beyond their own lines and beyond the limits of their respective states; such power being implied in their general corporate powers.—*Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35.

**App. 1883.** A stipulation in an excursion passenger ticket, sold at a special rate, which

requires the passenger to identify himself to an agent of one of the connecting carriers is a reasonable condition.—*Cloud v. St. Louis, I. M. & S. Ry. Co.*, 14 Mo. App. 136.

An excursion ticket calling for passage over connecting lines stipulated that the purchaser of the ticket would, before his departure on the return trip, identify himself as the original purchaser by writing his signature on the back of the contract in the presence of the authorized agent of the carrier at the commencement of the return trip. *Held*, that train conductors of connecting carriers could not waive the stipulation as to the purchaser identifying himself as the original purchaser in the manner specified, so as to bind any other connecting carrier.—*Id.*

A ticket calling for passage on several connecting lines is a contract of each one of the connecting carriers, so far as it relates to the transit over the road of such carrier, and therefore any waiver of the stipulations in the ticket by an agent of one of the connecting carriers is not binding on any other connecting carrier.—*Id.*

←260. **Actions for fares or charges.**

See explanation, page iii.

←261. **Redemption of tickets and repayment of charges.**

See explanation, page iii.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

←262. **Duties as to transportation in general.**

**Sup. 1895.** While it is the duty of a railroad company to keep its stations and approaches thereto in good condition, and to provide safe and convenient means of entrance and departure, and it is the duty of passengers to occupy the premises so provided for their use while waiting for trains, and, in going to and from the depot, offices, platforms, and trains, to use the ways and means provided for that purpose, this does not affect the liability of a carrier in a case where it has wholly neglected to provide a suitable depot or platform, and has left its patrons to stand in the open weather in midwinter without shelter or platform.—*Eichhorn v. Missouri, K. & T. Ry. Co.*, 32 S.W. 993, 130 Mo. 575.

**Sup. 1915.** Carrier held bound to carry female passenger to destination without unnecessary delay, to afford her the necessary and usual facilities for her comfort during



the journey, and to treat her with civility.—*Ferguson v. Missouri Pac. Ry. Co.*, 177 S.W. 616.

**App. 1885.** By the terms of the contract between a passenger and a carrier, the passenger is entitled to careful transportation and to kind consideration and courteous treatment by the carrier.—*Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609.

**App. 1908.** Failure to carry safely is a breach of the obligation imposed by the contract creating the relation of passenger and carrier.—*Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88, 134 Mo. App. 282.

263. **Performance of special contract.**  
*See explanation, page iii.*

264. **Route, time, and means of transportation.**

**Sup. 1888.** A railroad company was under no obligation to receive or transport passengers on a special train, running at the time for the particular purposes of the road, and not for the convenience of the traveling public, for whom trains were provided only on week days; but it is its privilege to do so, and if it did receive a person on its special train as a passenger, for the purpose of transportation from one place to another, it assumed toward him the same duties as if he had been a passenger, traveling on the same train on its regular trips, the passenger assuming no risks on this trip other than on a regular one, except such as were necessarily incident to the character of the train and the purposes for which it was being run.—*Wagner v. Missouri Pac. Ry. Co.*, 10 S.W. 486, 97 Mo. 512, 3 L. R. A. 156.

**App. 1884.** Where a person purchases of a railroad company a ticket from one point to another, and enters on the journey, the company is obliged to carry him only in the event that he continues on its vehicle until the transit is ended.—*Walker v. Wabash, St. L. & P. Ry. Co.*, 15 Mo. App. 333.

**App. 1906.** It is the duty of a carrier to transport a passenger within a reasonable time.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

265. **Receiving and taking up passengers.**

**App. 1915.** A carrier, stopping its train to receive passengers, impliedly invites them to board the train, and the invitation continues so long as the train remains standing.

—*Iba v. Chicago, B. & Q. R. Co.*, 176 S.W. 491, 186 Mo. App. 718.

266. **Accommodations during transit.**  
*See explanation, page iii.*

267. **Rules of carrier.**

Disobedience of rules as ground for ejection, see post, 350.

In respect to passenger's baggage, see post, 389.

**Sup.** A railroad company, being a carrier, may use separate trains for freight and passengers, and may exclude freight from one and passengers from the other.—(1889) *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409; (1903) *Farber v. Missouri Pac. Ry. Co.*, 22 S.W. 631, 116 Mo. 81, 20 L. R. A. 350.

**App. 1908.** A carrier may properly provide reasonable rules and regulations for the seating of passengers.—*McLain v. St. Louis & G. Ry. Co.*, 111 S.W. 835, 131 Mo. App. 733.

A contract of carriage is subject to all reasonable rules and regulations then in force, and a passenger accepts either the express or implied undertaking of carriage, with the understanding that he will conform to such regulations of the carrier with respect to the transportation as are appropriate and reasonable.—*Id.*

In the absence of any rule of a carrier to the contrary, a passenger has the right to remain in the seat first selected by him on entering a car, and cannot rightfully be removed to another by the conductor, though there are many vacant seats in the car, and the conductor had been occupying the seat selected just before the passenger entered the car.—*Id.*

**App. 1917.** Under universal transfer ordinance, street railroad's rule of refusing to issue to passenger, boarding car of one line where it crosses another, transfer to the other line at another point where the lines cross, is enforceable, where by transferring the passenger is not taking a substantially shorter route.—*Curren v. United Rys. Co. of St. Louis*, 196 S.W. 56, 197 Mo. App. 397.

268. **Stopping over at intermediate points.**

*See explanation, page iii.*

269. **Changes and transfers to connecting lines.**

Regulation, see ante, 12(10).

Statutory regulations, see ante, 15.

**App. 1894.** A regulation requiring a transfer check is not unreasonable, and a passenger must comply with the conditions thereof to entitle him to passage, even when the charter of the railway company provides for passage over two of its lines for one fare.—*Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 75.

#### ←270. Duties of connecting carriers.

**Sup. 1905.** The acceptance of a railroad ticket by one of the connecting carriers over whose lines it provides for passage does not require another of such carriers to accept it, the time for using it having expired.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

**App. 1895.** Rev. St. § 2588, authorizes railroad companies to contract with each other in any manner not inconsistent with the scope, object and purpose of their creation and management, and where they make contracts to carry beyond the limits of their own line they thus become liable for the acts and neglects of the others in no sense under their control, and the company so bound cannot defend on the ground of ultra vires.—*Cherry v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 303.

#### ←271. Carrying to and stopping at destination.

**Sup. 1852.** If a boat expressly contracts to land a passenger at a particular place, with knowledge of the danger attending it, such danger will be no defense to an action for damages for nonfulfillment of the contract.—*Porter v. The New England*, 17 Mo. 290.

**Sup. 1875.** In a suit against a railroad company for failing to carry plaintiff to its original depot, where it appeared that the company had abandoned its old depot for one half a mile short of that terminus, the question whether defendant had been guilty of a violation of the statutory requirements in failing to retain its old depot as a point of departure, and arrival of its passenger trains is a question that cannot be raised in such a suit.—*Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 508.

In an action against a railroad company for failure to carry a passenger to its original depot, where it appeared that the company had abandoned its old depot for one half a mile short of that terminus, the running of the trains uniformly to the new depot since the change, will be considered as a usage of

the company, in reference to which plaintiff must be considered to have contracted, especially where he knew of the change at the time of procuring his ticket.—*Id.*

**Sup. 1881.** A passenger negligently carried past her station, but suffering no physical injury in consequence, cannot recover for anxiety or suspense, or for exposure to danger caused by the starting of the train before she had time to dismount.—*Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305.

**Sup. 1903.** The rule laid down in a number of adjudicated cases respecting steam railroads that, where a passenger is wrongfully ejected from a train at a place between stations, the carrier is liable for injuries that may result to him while walking back to its station on the railroad track, cannot be applied so as to hold a street railroad company liable for injuries received by a person in slipping on an icy sidewalk while he was walking back to his home after being negligently carried beyond his usual stopping place.—*Haley v. St. Louis Transit Co.*, 77 S. W. 731, 179 Mo. 30, 64 L. R. A. 295.

**Sup. 1920.** In performance of contract to carry passenger safely to destination, carrier must use the utmost care that very prudent men employ in performing the contract of carriage with like means of transportation.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**Sup. 1923.** It is the duty of carriers to stop trains for the discharge of passengers at the platforms provided therefor.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1897.** Where an employé of a street railroad, whose sole duty was to take the registry of cars as they came in, and to signal the conductors when to start out, and to send and receive telephone messages, misdirects a passenger as to which car to take to arrive at her destination, and the passenger takes the car as directed, although told by the conductor of the car that it would not pass her destination, the company cannot be held liable for a breach of contract to carry the passenger to a certain place.—*Dillon v. Lindell Ry. Co.*, 71 Mo. App. 631.

**App. 1903.** A carrier is liable for injuries to a passenger owing to his having been carried by his station.—*Rawlings v. Wabash R. Co.*, 71 S.W. 534, 97 Mo. App. 515.

**App. 1903.** Where a passenger on a railroad train has been carried by her sta-

tion, the fact that the conductor did not know of her presence on the train does not excuse the carrier.—*Rawlings v. Wabash R. Co.*, 71 S.W. 535, 97 Mo. App. 511.

**App. 1900.** At an intersecting street, plaintiff, a passenger, was offered a transfer to another car, which was at hand, ready to carry him to his destination, four blocks north, but plaintiff refused the transfer, stating that if he had known the car was not going to his place of destination, as indicated thereon, before he boarded it, he would have taken another car; the car being transferred en route to another track in order to make up lost time. *Held*, that there was no actionable breach of the carrier's contract to transport plaintiff to destination.—*Dryden v. St. Louis Transit Co.*, 96 S.W. 1044, 120 Mo. App. 424.

272. **Discharging and setting down passengers.**

Injuries received in act of alighting, see post, 303.

**Sup. 1883.** Gen. St. 340, § 29, requiring passenger trains to stop at junctions with other roads, has no application to passengers other than those who desire to transfer from a train on one of the roads to a train on the other. A passenger whose destination is not such junction may take the chance of such a stoppage, if there are others on the train who desire to transfer; but the company owes him no duty to stop there for his accommodation.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 603.

**Sup. 1890.** In the absence of any rule, regulation, or custom to discharge passengers from freight trains different from those applicable to passengers on regular passenger trains, a railroad company incurs the duty of transporting a passenger safely to the place where its passengers are usually received and discharged in the course of its business, at the station of his destination, and a conductor, in requiring a passenger to get off a freight train at a distance from the station to which he had paid his fare, was guilty of a breach of this duty.—(1889) *Adams v. Missouri Pac. Ry. Co.*, 12 S.W. 637, 100 Mo. 555, judgment modified on rehearing 13 S.W. 509, 100 Mo. 555.

**Sup. 1920.** A carrier's contract safely to transport passenger to her destination is not performed until she has been discharged from car at a reasonably safe place.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**App. 1880.** If plaintiff, when he alighted from a train, was advised that he had been carried beyond the depot and that there was a culvert between the point where he alighted and the depot, his injury by falling into the culvert would not be the proximate result of defendant's negligence.—*Winkler v. St. Louis, I. M. & S. Ry. Co.*, 21 Mo. App. 99.

Plaintiff was carried some 250 feet beyond defendant's depot, and got off on a dark night, supposing, according to his testimony, that he was at the depot. He walked back along the track, the only available route, and fell through a trestle. *Held* the proximate result of defendant's negligence.—*Id.*

**App. 1901.** If a carrier's agents lead a passenger to believe that he is at the station, whereas in fact he is not, the fact being that the train has passed the station about a mile, and the night is dark, and such passenger, by reason of the representations, is induced to leave the train, the carrier is guilty of negligence.—*Atkinson v. Pacific Ry. Co.*, 90 Mo. App. 480.

273. **Actions arising out of breach of contract.**

274. — **Nature and form.**

**Sup. 1875.** In a suit against a railroad company for failing to carry plaintiff to its original depot, where it appeared that the company had abandoned its old depot for one a half mile short of that terminus, the question whether defendant had been guilty of a violation of the statutory requirements in failing to retain its old depot as a point of departure and arrival of its passenger trains is a question that cannot be raised in such a suit.—*Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 508.

**App. 1906.** In an action against a carrier, the petition alleged that plaintiff was accepted as a passenger, whereupon it became the duty of defendant to transport plaintiff with reasonable dispatch, but that defendant failed in such regard, whereby plaintiff was detained in the course of transportation a certain number of hours, and that the car in which plaintiff was being transported had no heating contrivance, that the weather was intensely cold, and the car locked so that plaintiff could not get out, and that plaintiff while so detained suffered from the coldness of the weather whereby he was injured, etc. *Held*, that the gravamen of the complaint was not failure to furnish a proper car, but a breach of duty in not transporting without unneces-

sary delay.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

### 274½. — Jurisdiction and venue.

*See explanation, page iii.*

### 275. — Pleading.

**Sup. 1878.** Plaintiffs' petition averred that one of the plaintiffs, a married woman, and her two infant children, were received by defendant in its passenger train at K., to be carried to V.; that on arrival at B., a station 10 miles from V., defendant forcibly ejected plaintiff from the train, to her damage, etc. The answer was a general denial. *Held*, that testimony as to defendant's regulations with regard to the train stopping at V. was inadmissible.—*Hicks v. Hannibal & St. J. R. Co.*, 68 Mo. 329.

**Sup. 1883.** A passenger was informed by the station agent that a certain train would stop at her station. The train was a through train, which did not stop at that station. *Held*, that her petition for damages should have counted on the negligent misstatement of the station agent, and not on the refusal of the conductor to stop.—*Marshall v. St. Louis, K. C. & N. Ry. Co.*, 78 Mo. 610.

**App. 1907.** In an action against a street railway for carrying plaintiff, a passenger, beyond her destination, an allegation in the petition that plaintiff was a stranger in the city was not material to her right of recovery.—*Henderson v. Metropolitan St. Ry. Co.*, 100 S.W. 1111, 123 Mo. App. 606.

### 276. — Evidence.

#### 276 (1). Presumptions and burden of proof.

**Sup. 1910.** A constant traveler on a line of railroad is presumptively chargeable with knowledge of the points at which trains on the line will stop.—*Powell v. St. Louis & S. F. R. Co.*, 129 S.W. 963, 229 Mo. 246.

#### 276 (2). Admissibility of evidence.

*See explanation, page iii.*

#### 276 (3). Weight and sufficiency.

**App. 1907.** In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, evidence *held* insufficient to sustain a charge of incivility on the part of the conductor.—*Smith v. St. Louis & S. F. R. Co.*, 106 S.W. 108, 127 Mo. App. 53.

**App. 1914.** In an action for damages for mistreatment of a woman by a carrier's con-

ductor, evidence *held* sufficient to support a verdict for plaintiff as to what occurred.—*Cook v. Lusk*, 172 S.W. 81, 186 Mo. App. 288.

### 277. — Damages.

#### 277 (1). Elements and measure of damages in general.

**Sup. 1881.** A passenger negligently carried past her station, but subjected to no incivility or bodily injury, can only recover for inconvenience, loss of time, labor, and expense of traveling back.—*Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305.

**App. 1877.** A painful and protracted illness resulting in permanent injury to the health of a passenger in an omnibus is not the natural and proximate consequence of her having been made to get off before the end of her trip in a frequented street of a populous city on a dry cold winter day, where she was not apparently in bad health, was well clad and in company with an intimate friend, near hotels and street railways; and for such injury to her health occasioned by her having exposed herself to the cold by walking home she could not recover from the proprietor of the omnibus.—*Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

**App. 1887.** Where a passenger who was forcibly ejected from defendant's train went out into the storm and staid out in it during the entire night, leaving the shelter of the station and neglecting the shelter of the farm houses along his route, the damages thus sustained he inflicted upon himself, and for them he has no right to recover. The fact that he had no money with him was no justification for such conduct under the proof.—*Corrister v. Kansas City, St. J. & C. B. R. Co.*, 25 Mo. App. 619.

**App. 1895.** Plaintiff was compelled to alight with her baggage a mile and more from her stopping place. Being a girl of 14 she was very much frightened from fear of tramps, and ran all the way, and as a result was ill up to the time of the trial. *Held*, that an instruction authorizing a recovery for mental distress and fright, unaccompanied by physical injury, was erroneous.—*Strange v. Missouri Pac. Ry. Co.*, 61 Mo. App. 586.

**App. 1898.** Where plaintiff was put off defendant's train before arriving at her destination, her act in subsequently surrendering her ticket and requiring defendant to refund to her a certain amount was no release of damages already resulting, and no bar to an

action therefor.—*Spry v. Missouri, K. & T. Ry. Co.*, 73 Mo. App. 203.

**App. 1903.** Where a child is carried 250 yards beyond his station, and put off without any injury, and there is no malice or inhumanity on the carrier's part, he may not recover for sickness owing to his having fallen down in the mud and become wet and frightened while going from the train to the station.—*Rawlings v. Wabash R. Co.*, 71 S.W. 534, 97 Mo. App. 515.

**App. 1907.** In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, and thus compelling her to ride to the next station, the measure of damages is such amount as will reasonably compensate her for actual inconvenience, loss of time, and labor of returning from the next station to her original destination.—*Smith v. St. Louis & S. F. R. Co.*, 106 S.W. 108, 127 Mo. App. 53.

**App. 1908.** Plaintiff, who was a stranger on defendant's road, and entitled to passage to M., was told by defendant's servants to get off at D., which was five miles distant from M. Plaintiff alighted as directed, and did not discover his mistake until after the train had left, when he was compelled to walk to M. through mud and rain. *Held*, that plaintiff was entitled to recover compensatory damages only.—*Moss v. Missouri Pac. Ry. Co.*, 107 S.W. 422, 128 Mo. App. 385.

**App. 1909.** A passenger injured by being misled to alight at night in a ditch beside a track, containing water, was entitled to have the jury consider the place where she alighted, the condition of the weather, and sickness and suffering, if any, caused thereby.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497, 135 Mo. App. 254.

277 (2). **Nominal or substantial damages.**

*See explanation, page iii.*

277 (3). **Mental suffering.**

**App. 1895.** Plaintiff was compelled to alight with her baggage a mile and more from her stopping place. Being a girl of 14 she was very much frightened from fear of tramps, and ran all the way, and as a result was ill up to the time of the trial. *Held*, that an instruction authorizing a recovery for mental distress and fright, unaccompanied by physical injury, was erroneous.—*Strange v. Missouri Pac. Ry. Co.*, 61 Mo. App. 586.

**App. 1899.** A passenger was carried beyond the station of her destination, and sub-

sequently put off the train, making it necessary for her to walk back half a mile to the station. The evidence in an action by the passenger tended to prove that the passenger's sickness was the result of fright, worry, and overtaxation of strength. *Held*, that the passenger was not entitled to recover damages for mental suffering, mental anguish being an element of damage only when connected with a bodily injury contemporaneously resulting from the negligence complained of.—*Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152.

277 (4). **Special damage dependent on knowledge of circumstances.**

**App. 1901.** Where a passenger by misrepresentations of the carrier's agents was induced to leave the train believing that it was at a station when in fact it was not, the fact that he was induced to leave the train at a place which was infested with thieves and robbers does not give him a right of action against the carrier for loss by being robbed, in the absence of evidence showing that the carrier's agents had actual knowledge of the reputation of the locality.—*Atkinson v. Pacific Ry. Co.*, 90 Mo. App. 489.

277 (5). **Exemplary damages.**

**Sup. 1878.** Plaintiff and her two infant children had tickets for transportation on defendant's train. The conductor in violent, unbecoming, and insulting language threatened to eject her from the train and sent a brakeman to execute the threat, which he did by taking one of the children and carrying it off, thus forcing plaintiff to follow with the remaining child. *Held* to warrant the allowance of punitive damages by the jury.—*Hicks v. Hannibal & St. J. R. Co.*, 68 Mo. 329.

**App. 1898.** The facts attending a refusal to permit a passenger to board a train going to his destination, where he expected to visit his brother, then about to die, being insufficient in law to show a wanton or malicious tort, the right to claim punitive damages thus excluded could not arise on the superadded disappointment and mental distress occasioned thereby.—*Barnett v. Chicago & A. R. Co.*, 75 Mo. App. 446.

**App. 1906.** Evidence in an action for carrying a passenger beyond his station *held* to authorize a finding that it was done willfully, intentionally, and without lawful excuse, so as to justify the granting of exemplary damages.—*Harlan v. Wabash R. Co.*, 94 S.W. 737, 117 Mo. App. 537.

**App. 1914.** Where a woman gave the conductor her ticket and he made her pay a second time, threatened to put her off the train, and maliciously used insulting language to her, she was entitled to punitive damages.—Cook v. Lusk, 172 S.W. 81, 186 Mo. App. 288.

**App. 1916.** Where the servants of a carrier excluded plaintiff from the train in good faith believing him to be intoxicated, though he was not, the carrier is not liable for punitive damages.—Davis v. Chicago, R. I. & P. Ry. Co., 182 S.W. 826, 192 Mo. App. 419.

In an action for punitive damages for wrongfully excluding plaintiff from its train and in procuring his arrest on a false charge, "malice" means intentional doing of a wrongful act in a reckless manner.—Id.

#### ←277 (6). Excessive damages

**Sup. 1881.** Where a female passenger was negligently carried past her station, but subjected to no insult or incivility, and returned the same evening on a hand car, a verdict for \$1,000 was excessive.—Trigg v. St. Louis, K. C. & N. Ry. Co., 74 Mo. 147, 41 Am. Rep. 305.

**Sup. 1883.** A passenger was carried beyond her station some 10 miles and paid \$1.50 for a conveyance back and lost a few hours time. *Held*, that a verdict for \$1,000 was excessive.—Marshall v. St. Louis, K. C. & N. Ry. Co., 78 Mo. 610.

**App. 1885.** Where the conductor of defendant's train willfully and wantonly refused to admit plaintiff to the train, and thereby exposed plaintiff to loss of time and great inconvenience on a disagreeable and wet night, in consequence of which he was obliged to pursue his journey on a second class train filled with "niggers and drinkers and ruffians," a verdict for \$100 was not excessive.—Brassfield v. Hannibal & St. J. Ry. Co., 19 Mo. App. 651.

**App. 1898.** The mere refusal to permit the holder of a ticket to board a passenger train going to his destination does not warrant the allowance of punitive damages.—Barnett v. Chicago & A. R. Co., 75 Mo. App. 446.

**App. 1903.** A passenger on a railroad train was carried beyond her station, and, after leaving the train and in her efforts to leave the station, fell between the slats of the cattle guard, which she was compelled to

cross, and received an abrasion of the skin on her legs and a bruise on her thigh. She fell down once or twice at other places, and by the time she reached the station was thoroughly wet. At the time it was very dark. *Held*, that a verdict for \$125 was not excessive.—Rawlings v. Wabash R. Co., 71 S.W. 535, 97 Mo. App. 511.

**App. 1906.** A verdict for \$5 actual damages for carrying a passenger 20 miles beyond his station, requiring him to wait two or three hours at night till he could be carried back, is not excessive.—Harlan v. Wabash Ry. Co., 94 S.W. 737, 117 Mo. App. 537.

**App. 1907.** In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train at the station, the evidence showed that she left the train from the rear end, being some distance from the depot, and then re-entered in order to ride to the depot, and intending to require the conductor to let her off on the station platform, in consequence of which act she was carried to a station three miles distant, and compelled either to wait four hours for a train back, to walk back, or take a carriage. It was about midnight, the station was lighted, the weather was pleasant and the roads good. *Held*, that a judgment for \$100 was excessive.—Smith v. St. Louis & S. F. R. Co., 106 S.W. 108, 127 Mo. App. 53.

**App. 1908.** Where a passenger was notified to alight at night at a station five miles distant from the destination to which he was entitled to be carried and was compelled to walk to such destination through mud and rain, but there was no case made for exemplary damages, a verdict allowing him \$300 was excessive, and will be reduced to \$200.—Moss v. Missouri Pac. Ry. Co., 107 S.W. 422, 128 Mo. App. 385.

**App. 1914.** In an action by a woman against a railroad for damages for mistreatment by the conductor, a verdict of \$250 actual and \$500 punitive damages was not excessive.—Cook v. Lusk, 172 S.W. 81, 186 Mo. App. 288.

**App. 1916.** Where the defendant railroad company wrongfully excluded plaintiff from its train and secured his arrest under a false charge of intoxication, so that he was incarcerated for almost a day, when the prosecution was dropped, an award of \$1,520 punitive damages is not excessive.—Davis v. Chicago, R. I. & P. Ry. Co., 182 S.W. 826, 192 Mo. App. 419.

278. — Trial.

278 (1). Questions for jury.

**App. 1896.** Where plaintiff entered defendant's street car on the distinct assurance of defendant's agent that it would take her to a designated point without change, there was sufficient evidence of a contract to require submission to the jury in an action by plaintiff for damages for refusal to carry her without change.—*Dillon v. Lindell Ry. Co.*, 64 Mo. App. 418.

**App. 1903.** A passenger on a railroad train was carried several hundred feet beyond her station, and, after leaving the train, and in her efforts to reach the station, fell between the slats of a cattle guard, which she was compelled to cross, and received abrasions of the skin on her legs and a bruise on her thigh. She fell down once or twice at other places, and by the time she reached the station was thoroughly wet. At the time it was very dark. *Held*, in an action against the carrier, that whether her injured feelings were connected with the bodily injury so as to entitle her to damages for such feelings was for the jury.—*Rawlings v. Wabash R. Co.*, 71 S.W. 535, 97 Mo. App. 511.

**App. 1906.** In an action against a carrier for injuries to a passenger riding on a freight train, owing to alleged negligent delay in transportation and consequent exposure to cold, the question whether there was negligent delay *held* one for the jury.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

**App. 1907.** In an action against a street railway for carrying a passenger beyond her destination, evidence *held* to warrant the submission to the jury of the question whether or not plaintiff was negligently carried to defendant's car barn.—*Henderson v. Metropolitan St. Ry. Co.*, 100 S.W. 1111, 123 Mo. App. 666.

278 (2). Instructions.

**App. 1898.** A petition for injuries by a passenger alleged that defendant carried plaintiff to a point short of her destination, where it announced that it was necessary for her to leave the train, about one-half mile from depot or station, in the midst of various railroad tracks and switches, in a place filled with mud and water, when a storm was raging, and failed to give her any directions as to where she should go for shelter; that plaintiff was a stranger in the vicinity, and that she was compelled to walk along the tracks to the depot, in consequence of which her health

was permanently injured. The court instructed for plaintiff that if defendant's train stopped while a heavy storm was raging at a place where there were no reasonable accommodations for passengers, though at a place where such trains usually stopped, and plaintiff was required by defendant to leave the train at that place in the rain and mud, distant from any reasonable accommodations, and that by reason thereof she was made sick, she should recover. *Held*, that the instruction did not present a theory at variance with that of the petition.—*Spry v. Missouri, K. & T. Ry. Co.*, 73 Mo. App. 203.

**App. 1907.** Where, in an action against a street railway for carrying plaintiff, a passenger, beyond her destination, one allegation of the petition was that defendant failed to put plaintiff off at Nineteenth and F. streets, while another allegation named Nineteenth and V. streets, and one of defendant's own instructions was that, if plaintiff was put off at Nineteenth and V. streets, defendant was not liable, an instruction directing a verdict for failure to put plaintiff off at the latter corner, was not misleading; all the testimony showing that plaintiff was to be put off at Nineteenth and F. streets.—*Henderson v. Metropolitan St. Ry. Co.*, 100 S.W. 1111, 123 Mo. App. 666.

Where, in an action against a street railway for carrying plaintiff, a passenger, beyond her destination, the petition alleged that plaintiff was carried to defendant's car barn, an instruction authorizing a recovery, if plaintiff was carried beyond her destination to another and distant part of the city, was not erroneous.—*Id.*

Plaintiff's evidence being that she was carried to defendant's car barn, which was ten blocks distant, and defendant's evidence being that plaintiff was put off only one block from her destination, the instruction was not subject to the rule that an instruction, which of itself covers the whole case and authorizes a finding for either party, must not exclude from the consideration of the jury any material issue supported by substantial evidence on either side.—*Id.*

**App. 1928.** Requested instruction for railroad, in action for misdirecting passenger, limiting passenger's recovery to loss of time, expense and nominal damages, *held* erroneously refused under evidence.—*Evans v. Wabash Ry. Co.*, 12 S.W.(2d) 767.

278 (3). Verdict and findings.

See explanation, page iii.

—279. — Costs.

See explanation, page iii.

(D) PERSONAL INJURIES.

Contributory negligence of person injured, see post, —323-349.

Ejection of passengers and intruders, see post, —350-386.

Negligent carrying of passenger beyond destination, see ante, —271.

Who are passengers, see ante, —237-246.

—280. Care required and liability of carrier in general.

Admissibility of evidence, see post, —317.

—280 (1). Care required in general.

A carrier of passengers must exercise the highest degree of care for their safety.

—Sup. 1914. *Wentz v. Chicago, B. & Q. R. Co.*, 168 S. W. 1166, 259 Mo. 450, Ann. Cas. 1916B, 317; (1925) *Brindley v. Wells*, 271 S. W. 48, 308 Mo. 1;

App. 1903. *Tillman v. St. Louis Transit Co.*, 77 S. W. 320, 102 Mo. App. 553; (1908) *Wills v. Atchison, T. & S. F. Ry. Co.*, 113 S. W. 713, 133 Mo. App. 625; (1909) *Martin v. Missouri Pac. Ry. Co.*, 119 S. W. 444, 137 Mo. App. 694; (1910) *Cooke v. Springfield Traction Co.*, 129 S. W. 265, 144 Mo. App. 451; (1919) *Burkett v. Missouri Pac. R. Co.*, 208 S. W. 104; (1924) *Cecil v. Wells*, 259 S. W. 844, 214 Mo. App. 193.

A carrier of passengers is not an insurer, but is bound to highest degree of care.

—Sup. 1890. *Furnish v. Missouri Pac. Ry. Co.*, 13 S. W. 1044, 102 Mo. 438, 22 Am. St. Rep. 781; (1912) *Stauffer v. Metropolitan St. Ry. Co.*, 147 S. W. 1032, 243 Mo. 305;

App. 1905. *Hamilton v. Metropolitan St. Ry. Co.*, 89 S. W. 893, 114 Mo. App. 504; (1908) *Canaday v. United Rys. Co. of St. Louis*, 114 S. W. 88, 134 Mo. App. 282; (1910) *Rice v. Chicago, B. & Q. Ry. Co.*, 131 S. W. 374, 153 Mo. App. 35; (1913) *Craig v. United Rys. Co. of St. Louis*, 158 S. W. 390, 175 Mo. App. 616.

A carrier of passengers is bound to exercise the utmost care, diligence and foresight which capable railroad men would use in similar circumstances, or the utmost care and skill which prudent men use and exercise in a like business.

—Sup. 1908. *Kirkpatrick v. Metropolitan St. Ry. Co.*, 109 S. W. 682, 211 Mo. 68.

App. 1912. *Richardson v. Metropolitan St. Ry. Co.*, 147 S. W. 1126, 166 Mo. App. 162.

Sup. 1866. It is the duty of a carrier of passengers to exercise extraordinary care and caution, and it is liable for injuries to a passenger caused mediately or immediately by its negligence, if the passenger was not guilty of any contributory negligence.—*Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

Sup. 1878. Passenger carriers bind themselves to carry safely those whom they take into their coaches as far as human care and foresight can go—that is, for the utmost care and diligence of very cautious persons; and they are responsible for any, even the slightest, negligence.—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

Sup. A carrier is not an insurer of the safety of its passengers.—(1882) *Gilson v. Jackson County Horse Ry. Co.*, 76 Mo. 282; (1885) *Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50; (1926) *Bond v. St. Louis-San Francisco Ry. Co.*, 288 S. W. 777, 315 Mo. 987.

Sup. 1882. Where a passenger is on the track of a railroad under such circumstances as do not create any duty on the part of the railroad company toward him beyond that of not willfully injuring him, it is unnecessary to consider whether the company was guilty of mere negligence.—*Henry v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 288, 43 Am. Rep. 762.

Sup. 1884. While a carrier is not an insurer of the safety of passengers, it is bound to exercise due care and vigilance to safely transport them.—*Dougherty v. Missouri Pac. R. Co.*, 81 Mo. 325, 51 Am. Rep. 239.

Sup. 1885. A conductor of a railway train is not required to exercise judicial functions and pass upon the case of every prisoner transported over the road by authorized officers.—*Jackson v. St. Louis, I. M. & S. Ry. Co.*, 87 Mo. 422, 56 Am. Rep. 460.

Sup. 1888. An instruction that, in the transportation of passengers, the carrier must exercise the utmost human foresight, skill, and care, states the degree of care required of the carrier too broadly.—*Dougherty v. Missouri R. Co.*, 11 S.W. 251, 97 Mo. 647, reversing judgment on rehearing 8 S.W. 900, 97 Mo. 647.

Sup. 1890. A railroad company is liable to a passenger for slight negligence, and is



bound to furnish a reasonably safe and sufficient track, rolling stock, and service so far as can be provided by the utmost human skill, diligence, and foresight, which is such skill, diligence, and foresight as is exercised by a very cautious person; but it does not insure safety.—*Furnish v. Missouri Pac. Ry. Co.*, 13 S.W. 1044, 102 Mo. 438, 22 Am. St. Rep. 781.

**Sup. 1891.** The degree of care required of a carrier towards its passengers is proportionate to the nature and risks of the business, and is such as would ordinarily be exercised by persons of great care and prudence under similar circumstances.—*O'Connell v. St. Louis Cable & W. Ry. Co.*, 17 S.W. 494, 106 Mo. 482.

**Sup. 1893.** In an action for injuries sustained on a cable railway car, an instruction excusing the defendant if the liability of the grip shank to break or the insufficiency of the brake was either not known to the defendant or was such as could not have been known by the utmost practicable care, was erroneous, in the misuse of the word "or" for "and"; for it cannot be contended that the mere want of knowledge of the insufficiency of the grip or brake would relieve the defendant.—*Sharp v. Kansas City Cable Ry. Co.*, 20 S.W. 93, 114 Mo. 94.

**Sup. 1894.** An instruction imposing on a carrier of passengers the duty of exercising such a high degree of care as would be exercised by very prudent persons under like circumstances, and making the carrier liable for even the slightest neglect to use such care, if such neglect caused injury to a passenger, and if he exercised ordinary care at the time of the injury, makes a carrier only liable for neglect to use such a degree of care as would be used by very prudent persons under like circumstances, and is proper.—*Bischoff v. Peoples Ry. Co.*, 25 S.W. 908, 121 Mo. 216.

**Sup. 1895.** The obligation of a steam railway carrier to its passengers, is, as far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from any, even the slightest, neglect.—*Clark v. Chicago & A. R. Co.*, 29 S.W. 1013, 127 Mo. 197.

**Sup. 1895.** Carriers of passengers, not being insurers of their safety, are not responsible where all reasonable care, skill, diligence, prudence, and foresight have been employed.—*Hite v. Metropolitan St. Ry. Co.*, 31 S.W. 262, 130 Mo. 132, 51 Am. St. Rep. 555,

rehearing denied 32 S.W. 33, 130 Mo. 132, 51 Am. St. Rep. 555.

**Sup. 1901.** In an action against a carrier for injuries, a charge requiring of defendant such care and foresight as is "reasonably practicable" is sufficient, and should not require of defendant "the utmost practicable human skill, diligence, and foresight."—*Feary v. Metropolitan St. Ry. Co.*, 62 S.W. 452, 102 Mo. 75.

**Sup. 1904.** The care which a carrier owes to its passenger is of a very high degree, but is not the utmost care that human imagination can conceive.—*Magrane v. St. Louis & Suburban Ry. Co.*, 81 S.W. 1158, 183 Mo. 119.

**Sup.** A carrier owes to a passenger the highest degree of care that a prudent person experienced in that business usually or can practicably exercise.—(1912) *Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598; (1914) *Powell v. Union Pac. R. Co.*, 164 S.W. 628, 255 Mo. 420.

**Sup. 1912.** A common carrier of passengers is required to provide a reasonably safe track and roadbed, and to operate its train with careful employes.—*Norris v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 783, 239 Mo. 695.

**Sup. 1917.** Carriers must exercise the greatest vigilance in preserving peace and protecting passengers from disturbances which will cause injury to them by reason of fright or panic.—*Hendrix v. United Rys. Co. of St. Louis*, 193 S.W. 812.

**Sup. 1920.** Carriers are required to exercise the highest practical care for the safety of their passengers.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**Sup. 1923.** Undertaker who contracts to transport persons to and from a funeral in an automobile even though not a public or common carrier, is under the same obligation to carry passenger safely as if he had been a public or common carrier under Laws 1911, p. 330, § 12, subd. 9, relating to motor vehicles.—*Mahany v. Kansas City Rys. Co.*, 254 S.W. 16, 29 A. L. R. 817.

**App. 1877.** Degree of care required of common carriers of passengers. See *Iladerlein v. St. Louis R. Co.*, 3 Mo. App. 601, memorandum.

**App. 1881.** A livery stable keeper while engaged in the gratuitous service of carrying performers to and from an entertainment giv-

en for charitable purposes was not a public or common carrier, and consequently the strict care and diligence which the law exacts of public carriers of passengers does not furnish the measure of his liability, but he was nevertheless bound to use that degree of care which a prudent man, having due regard for his social obligations, would have bestowed.—*Siegrist v. Arnot*, 10 Mo. App. 197.

**App. 1891.** Carriers must treat their passengers with respect and endeavor to protect them from injury or insult.—*Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536.

**App. 1892.** In an action against a railroad for injuries to a passenger, defendant could not complain of an instruction to the effect that it was bound to exercise reasonable care, and that reasonable care meant such care as a prudent man would exercise under the circumstances.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 48 Mo. App. 224.

**App. 1898.** In an action against a carrier for personal injuries, an instruction stating that a carrier is required to exercise a high degree of care such as would have been exercised by very careful and skillful railroad employes is not objectionable as requiring too high a degree of care.—*Posch v. Southern Electric R. Co.*, 76 Mo. App. 601.

**App. 1899.** The obligation of a railway carrier to its passengers imposes on it the exercise of human care and foresight to carry them safely, and it is responsible for all injuries resulting to its passengers from any, even the slightest, neglect.—*Chouquette v. Southern Electric Ry. Co.*, 80 Mo. App. 515.

**App. 1901.** In an action against a carrier for damages for injuries, an instruction that the degree of care which the law requires of defendant in the operation of its cars for carrying passengers, and the degree of care which it was the duty of defendant's employes to use in the management of the car on which plaintiff was riding at the time of the accident, is the highest degree of care which could ordinarily be expected of very prudent persons under the like or similar circumstances is proper.—*Muth v. St. Louis & M. R. R. Co.*, 87 Mo. App. 422.

**App. 1902.** A carrier of passengers must exercise the highest degree of care of a prudent person in view of the circumstances, and this duty extends to assisting passengers in getting on and off cars.—*Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**App. 1903.** Carriers must use the utmost care, skill, and vigilance to carry passengers safely.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

**App. 1905.** A carrier of passengers, either steam or street railway, is required, so far as it is capable by the exercise of a very high degree of care, to carry them safely and is responsible for all injuries resulting from even the slightest negligence on its part.—*Brod v. St. Louis Transit Co.*, 91 S.W. 993, 115 Mo. App. 202.

**App. 1905.** A common carrier of passengers is required, so far as it is capable by human care and foresight, to carry its passengers safely, and is responsible for all injury resulting to them from the slightest negligence on its part, but it is not, either in respect to the equipment it provides for the carriage of passengers or as to its management of that equipment when carrying them, an insurer of their safety.—*Evers v. Wiggins Ferry Co.*, 92 S.W. 118, 116 Mo. App. 130.

**App. 1906.** A carrier of passengers is bound to exercise the care a very prudent person would exercise under similar circumstances.—*Gilroy v. St. Louis Transit Co.*, 92 S.W. 1152, 117 Mo. App. 663.

**App. 1909.** A carrier of passengers is bound to exercise extraordinary diligence or care in performing all of the duties imposed by that relation.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084, 142 Mo. App. 718.

**App. 1910.** A carrier owes the highest degree of care that a very cautious, competent, and prudent person would exercise under the same or similar circumstances to protect its passengers from injury.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421; *Austin v. St. Louis & S. F. R. Co.*, 130 S.W. 385, 149 Mo. App. 397.

**App. 1910.** What is required of a carrier in the performance of its duties to use proper care for the safety of its passengers depends in a given case on the facts thereof, and not on the common practice of the carrier.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1910.** Where a passenger on a street car, though not at his destination, is passing from the platform down the steps with the knowledge of the motorman or conductor while the car is in motion, it then becomes their duty to exercise a high degree of care in the management of the car, so that the

passenger will not be thrown therefrom by any extraordinary movement of the car.—*Ely v. Southwest Missouri R. Co.*, 125 S.W. 833, 141 Mo. App. 708.

**App. 1910.** A carrier of passengers is not an insurer, but must exercise the utmost care and diligence of a cautious person so as to safely transport them.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

**App. 1912.** A chauffeur of a sight-seeing automobile which carried passengers held to owe them the highest degree of care.—*McFadden v. Metropolitan St. Ry. Co.*, 143 S.W. 884, 161 Mo. App. 652.

**App. 1913.** Mail clerk assumes risk incident to his transportation though carrier is required to exercise toward him same high degree of care generally imposed in favor of passengers.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S.W. 327. See Carriers, 282 in this Digest.

**App. 1914.** A carrier of passengers is held to the highest degree of care in operating its cars, and can only relieve itself from liability for injuries sustained in a derailment by showing that the accident was inevitable, and could not have been prevented by human foresight.—*Patterson v. Springfield Traction Co.*, 163 S.W. 955, 178 Mo. App. 250.

**App. 1915.** A common carrier of passengers is bound to provide for their safety so far as human care, skill, and foresight can do so.—*Siegel v. Illinois Cent. R. Co.*, 172 S.W. 420, 186 Mo. App. 645.

**App. 1921.** It is the duty of a common carrier to use the "utmost care, skill, and diligence" to transport its passengers, which means the care, skill, and diligence that a cautious man in similar employment would use.—*Link v. Atlantic Coast Line R. Co.*, 233 S.W. 834.

**App. 1926.** Carrier must exercise every reasonable and practicable precaution for safety of its passengers.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) *State ex rel. St. Louis & S. F. R. Co. v. Daues*, 290 S.W. 425.

**App. 1928.** Carrier is not liable to passenger, in absence of legal fault or breach of legal duty.—*Bennett v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 1028.

#### 280 (2). Statutes imposing liability.

See explanation, page iii.

#### 280 (3). Liability of street railroad companies.

A street car company is bound to exercise the highest care and skill for the safety of passengers that a prudent man would exercise in a like business and under like circumstances.

—**Sup. 1891.** *Willmott v. Corrigan Consol. St. Ry. Co.*, 17 S.W. 490, 106 Mo. 535, affirming judgment by court in banc 16 S.W. 500, 106 Mo. 535; (1904) *Redmon v. Metropolitan St. Ry. Co.*, 84 S.W. 26, 185 Mo. 1, 105 Am. St. Rep. 558; (1907) *Schloemer v. St. Louis Transit Co.*, 102 S.W. 565, 204 Mo. 99; *O'Gara v. St. Louis Transit Co.*, 103 S.W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850; **App. 1903.** *Heyde v. St. Louis Transit Co.*, 77 S.W. 127, 102 Mo. App. 537; (1905) *Nelson v. Metropolitan St. Ry. Co.*, 88 S.W. 1119, 113 Mo. App. 702; (1917) *Coolley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

A street car company is obliged to use the utmost care to carry passengers safely.

—**Sup. 1894.** *Bischoff v. People's Ry. Co.*, 25 S.W. 908, 121 Mo. 216; **App. 1894.** *Powers v. Union Ry. Co.*, 60 Mo. App. 481.

**Sup. 1893.** Street car companies are carriers of passengers, and must be held to the same degree of care in preventing injury to their passengers as is demanded of other railways in carrying passengers, that is to say, the utmost care and skill which prudent men would use and exercise in like business and under similar circumstances.—*Jackson v. Grand Avenue Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**Sup. 1899.** A street railway company, in the transportation of passengers, must use the utmost degree of care and skill for their protection in the preparation and management of the means of conveyance.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

**Sup. 1908.** In an action by a passenger for injuries from the overturning of a car, where there was evidence that the tracks were not in a proper condition, defendant requested an instruction that a carrier of passengers is not obliged to foresee and provide against casualties which were not known to occur before, and which may not reasonably be expected, and that, if a carrier availed himself of the best known and most extensively used safeguards against danger, he has done all the law requires, and his liability is

not to be ascertained by what appears, for the first time after the disaster, to be a proper precaution against these occurrences; that the defendant and its agents, etc., in the management and operation of its cars, were by the law required to exercise only such care and prudence as was reasonably practicable, and if plaintiff was injured as the result of some occurrence, which careful and prudent men in the situation of defendant's agents would not reasonably have expected, then the occurrence was an accident, and defendant was not liable; that the mere fact that an accident occurred, and plaintiff was injured, does not of itself entitle plaintiff to recover, and if defendant's servants exercised all the care and prudence that were reasonably practicable under all the circumstances, and the accident happened without negligence on their part, then plaintiff could not recover under any circumstances. *Held*, that the requests were properly refused, as not imposing a sufficiently high degree of care upon the carrier. —*Kirkpatrick v. Metropolitan St. Ry. Co.*, 109 S.W. 682, 211 Mo. 68.

**Sup. 1909.** It is the duty of a street railway company to exercise that high degree of care for the safety of passengers that a very careful person would use under like circumstances. —*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

**Sup. 1922.** A street railway owes to its passengers a high degree of care. —*Walquist v. Kansas City Rys. Co.*, 237 S.W. 493.

**Sup. 1925.** Intent in enacting vigilant watch ordinance stated. —*Toomey v. Wells*, 276 S.W. 64, 310 Mo. 696.

**App. 1891.** A street railway owes to a passenger the duty to exercise the highest possible degree of care and vigilance in the conduct and management of its cars in every particular, with a view to his safety. —*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1894.** An instruction in an action for personal injuries received in a street railroad accident, that defendant is required to exercise the utmost practicable skill, care, knowledge, and foresight, inspection and examination of its road, roadbed, track, cars, etc., is erroneous in requiring too great a degree of care; it being required to exercise the utmost care and skill which prudent men are accustomed to use under similar circumstances, and not the utmost degree of care

which the human mind can attain or is capable of inventing. —*Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

**App. 1895.** In an action for personal injuries to a passenger on a street railway, an instruction that it was the railway company's duty to exercise the highest practicable care, caution, and diligence to transport plaintiff is not erroneous as imposing too great a degree of care. —*Powers v. Union Ry. Co.*, 60 Mo. App. 481.

**App. 1897.** Street car companies like ordinary railroad corporations owe to their passengers more than ordinary care for safe carriage; they are bound to exercise a very high degree of care or "the very highest degree of care of a very prudent person." —*Parker v. Metropolitan St. Ry. Co.*, 69 Mo. App. 54.

**App. 1902.** In an action against a street railway company for injury to a passenger due to the sudden stopping of the car, an instruction that if "the said accident could have been prevented by the exercise of the utmost human skill, diligence, and foresight on the part of defendant's employés," defendant was liable, was erroneous, because imposing too high a degree of care. —*Freeman v. Metropolitan St. Ry. Co.*, 68 S.W. 1057, 1060, 95 Mo. App. 94, 314.

**App. 1904.** A street railroad owes to its passengers a very high degree of care and foresight. —*Snider v. Chicago & A. Ry. Co.*, 83 S.W. 530, 108 Mo. App. 234.

**App. 1904.** The obligation of a street railroad to a passenger is not that of an insurer of his safety, but it is incumbent on it to exercise a high degree of care and vigilance, by permitting him a reasonable time to board the car, and by safely transporting him. —*Maggioli v. St. Louis Transit Co.*, 83 S.W. 1026, 108 Mo. App. 416.

**App. 1907.** Where a street car passenger paid his fare and received a transfer, and on boarding another car presented the transfer un mutilated entitling him to ride as a passenger to his destination, the carrier and its servants were bound to safely carry him to his destination if they could do so by the exercise of the high degree of care of careful railroad employés under the same or like circumstances. —*Carmody v. St. Louis Transit Co.*, 99 S.W. 495, 122 Mo. App. 338.

**App. 1908.** The failure of a railroad company to exercise reasonable care to avoid a collision with a street car at a crossing did

not excuse the street railway company's failure to exercise the highest degree of care to protect its passengers.—*Wills v. Atchison, T. & S. F. Ry. Co.*, 113 S.W. 713, 133 Mo. App. 625.

**App. 1911.** A street railway company, as a carrier of passengers, is not an insurer of their safety, but must exercise the highest degree of care.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

**App. 1914.** A street railroad company, as a common carrier, is charged with the duty of exercising the highest degree of care for the safety of its passengers, and is liable in damages for the slightest negligence in the performance of this duty.—*Agnew v. Metropolitan St. Ry. Co.*, 165 S.W. 1110, 178 Mo. App. 119.

**App. 1917.** A carrier, the steps of whose street car are covered with snow and ice, is required to use, not ordinary care, but a high degree of care.—*Bate v. Harvey*, 195 S.W. 571.

280 (4). **Liability of owner of elevator.**

Operators of passenger elevators must use the highest degree of care consistent with the practical operation.

—**Sup. 1903.** *Luckel v. Century Bldg. Co.*, 76 S.W. 1035, 177 Mo. 608; (1904) *Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 182 Mo. 597;

**App. 1906.** *Becker v. Lincoln Real Estate & Building Co.*, 93 S.W. 291, 118 Mo. App. 74; (1912) *Howard v. Scarritt Estate Co.*, 144 S.W. 185, 161 Mo. App. 552.

**Sup. 1900.** It is the duty of the owner of a building maintaining an elevator for the carriage of passengers to use the highest degree of practicable care which prudent men would observe in like circumstances, and he is bound to use the utmost care in the choice and maintenance of machinery and appliances, and is liable for the negligence of an operator, irrespective of the degree of care exercised in his employment.—*Lee v. Publishers: George Knapp & Co.*, 56 S.W. 458, 155 Mo. 610.

**Sup.** A carrier by elevator is not an insurer, but is required to exercise the highest degree of care.—(1903) *Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246; (1904) *Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 182 Mo. 597.

**Sup. 1903.** Persons operating elevators for raising and lowering persons in buildings

are carriers of passengers, and subject to the same rules applicable to other carriers of passengers, requiring that they use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein.—*Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246.

**Sup. 1916.** That the elevator shaft doors causing the injury were operated in the usual and customary way that this and other similar elevators and doors were operated *held* not necessarily to relieve defendant from liability.—*Howard v. Scarritt Estate Co.*, 184 S.W. 1144, 267 Mo. 398.

**Sup. 1917.** Owner and operator of passenger elevator is required to exercise utmost care and skill which prudent men would use and exercise in like business under similar conditions.—*McCardle v. George B. Peck Dry Goods Co.*, 195 S.W. 1034, 271 Mo. 111.

**Sup. 1928.** Defendant *held* subject to highest care in operating and maintaining elevator, as to invitee, injured by fall therefrom, establishing *prima facie* case.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**App. 1905.** In an action for injuries to a passenger by the operation of an elevator, the court should have charged that defendants were liable for slight negligence on the part of their employé in charge of the elevator.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**App. 1911.** A carrier of passengers by elevator must use the utmost care and skill in the choice and maintenance of the machinery and appliances and the selection of operatives.—*Chambers v. Kupper-Benson Hotel Co.*, 124 S.W. 45, 154 Mo. App. 249.

280 (5). **Liability as to passengers on freight or mixed trains.**

A railroad company undertaking to carry passengers for hire upon its freight trains owes them the same duty as to care which the law exacts of it as to passengers transported on passenger trains, the only difference being that the passenger on a freight train assumes those dangers or perils which are necessarily incident to that mode of conveyance.

—**Sup. 1887.** *McGee v. Missouri Pac. Ry. Co.*, 4 S.W. 739, 92 Mo. 208, 1 Am. St. Rep. 706; (1889) *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409; (1901) *Wait v. Oma-*

ha, K. C. & E. R. Co., 65 S.W. 1028, 165 Mo. 612;

**App.** 1890. *Tuley v. Chicago, B. & Q. Ry. Co.*, 41 Mo. App. 432; (1900) *Fullerton v. St. Louis, I. M. & S. Ry. Co.*, 84 Mo. App. 498.

Though passengers riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such train, the carrier owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train; its duty being modified only by the nature of the train and necessary difference in its mode of operation.

—**Sup.** 1908. *Tinkle v. St. Louis & S. F. R. Co.*, 110 S.W. 1086, 212 Mo. 445;

**App.** 1908. *Hawk v. Chicago, B. & Q. Ry. Co.*, 108 S.W. 1119, 130 Mo. App. 658; *Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143; (1910) *Tickell v. St. Louis, I. M. & S. Ry. Co.*, 129 S.W. 727, 149 Mo. App. 648.

**App.** 1900. In an action to recover for injuries received by plaintiff while a passenger on defendant's freight train, an instruction that it was "the duty of defendant to use the utmost care and skill which prudent men would use and exercise in like business and under like circumstances to safely transport plaintiff to his destination" does not impose a greater duty of care on defendant than is required by law.—*Fullerton v. St. Louis, I. M. & S. Ry. Co.*, 84 Mo. App. 498.

**App.** Although the responsibility of a railroad for the safe transportation of passengers on a freight train is not restricted or lessened, and the same degree of care is required in the management of such a train when carrying passengers as in the operation of a train exclusively for passenger service, yet a passenger on a freight train is charged with knowledge of and assumes the hazards inherent in that mode of travel.—(1902) *Erwin v. Kansas City, Ft. S. & M. Ry. Co.*, 68 S.W. 88, 94 Mo. App. 289; (1903) *Portuchek v. Wabash R. Co.*, 74 S.W. 368, 101 Mo. App. 52.

**App.** A railway carrying passengers on its freight trains is required to exercise the same care as to them as in operating an exclusively passenger train.—(1902) *Erwin v. Kansas City, Ft. S. & M. Ry. Co.*, 68 S.W. 88, 94 Mo. App. 289; (1905) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, judgment affirmed 88 S.W. 767, 113 Mo. App. 636.

**App.** 1906. The fact that a passenger is riding on a freight train does not relieve the

carrier of liability for injuries to him owing to negligent delay in transportation.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

**App.** 1907. Where a railroad undertook for hire to carry a person as a passenger on a freight train, it was required to use the same degree of care as was required in the operation of its regular passenger trains; the passenger submitting himself to the inconvenience and danger necessarily attending that mode of conveyance.—*Russell v. Quincy, O. & K. C. R. Co.*, 102 S.W. 613, 125 Mo. App. 441.

**App.** 1909. While passengers on a mixed train cannot expect all the conveniences furnished on regular passenger trains, the carrier must exercise as high care for their safety as is compatible with the management of such trains.—*Leach v. St. Louis & S. F. R. Co.*, 118 S.W. 510, 137 Mo. App. 300.

**App.** 1911. A carrier of passengers on its regular passenger train or mixed train or freight train must exercise a high degree of care for the safety of its passengers, except in so far as the duty is modified by the circumstance of the different character of the train, and a passenger does not take the risk of a carrier's negligence in breaching the obligation of high care for his safety.—*Allison v. St. Louis & H. Ry. Co.*, 137 S.W. 896, 157 Mo. App. 72.

A passenger on a mixed or freight train assumes the risks usually attendant on such trains and ordinarily incident to their movement and management, but he does not assume the risk of the carrier's negligence in breaching the obligation of high care for his safety.—*Id.*

**App.** 1912. A railroad company held liable for injuries to a passenger in a freight car caused by negligence of switchmen.—*Richmond v. Missouri Pac. Ry. Co.*, 144 S.W. 168, 162 Mo. App. 422.

**App.** 1916. Passengers carried in a mixed train are entitled to be carried with as high a degree of safety as is compatible with the management of such a train.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S.W. 573.

**App.** 1919. The degree of care as to passengers required of carrier is the same, regardless of the character of train, but as to what facts will raise an inference of negligence differs in the case of passenger trains and freight trains.—*Burkett v. Missouri Pac. R. Co.*, 208 S.W. 104.

⚡280 (6). Care required as to passengers riding in places not designed for them.

**Sup. 1801.** Plaintiff was injured by being thrown from defendant's street car while standing on the platform. *Held*, that while it was plaintiff's duty to place himself in a safe position on the car, and in remaining outside he assumed the risk, yet the fact of his riding on the platform did not sever his relation of passenger to defendant, and he had a right to the same care of defendant that he would have been entitled to if he had taken a seat inside the car.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 16 S.W. 500, 106 Mo. 535, judgment affirmed by court in banc 17 S.W. 490, 106 Mo. 535.

**Sup. 1891.** A carrier is not liable for failure to take steps to avert injury from one who has negligently placed himself in danger, where it has not omitted to discharge any duty towards such person.—*Carroll v. Interstate Rapid-Transit Co.*, 17 S.W. 889, 107 Mo. 653.

**Sup. 1903.** A street railway company assuming to carry a passenger standing on the steps of the platform of the car, outside of the gate, and on the side next to the other track, on which cars run in the opposite direction, is chargeable with the duty of carrying him safely in that position, if it can be done by that high degree of care which the law requires the company to observe towards its passengers.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

**Sup. 1904.** Where a passenger is permitted to stand on the platform of a car, there is imposed on the carrier the duty of handling the car with increased care, in view of his exposed position.—*Magrane v. St. Louis & S. Ry. Co.*, 81 S.W. 1158, 183 Mo. 119.

**App. 1910.** Where decedent elected to ride on the platform of a street car when there was plenty of room inside, and was thrown from the car and killed before it reached decedent's transfer point, the test of the carrier's liability is not the rule of care required of a passenger who is leaving the car at his destination, but the care required as to passengers at other points along the line.—*Ely v. Southwest Missouri R. Co.*, 125 S.W. 833, 141 Mo. App. 708.

**App. 1917.** Street car company which permits passengers to ride upon steps of car is charged with higher degree of care owing to increased danger, and is to be held liable for even slight negligence.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

**App. 1918.** Where a man standing on the step outside the line of street car was accepted as a passenger, carrier had the duty of exercising the high degree of care required by their relations, and commensurate with the circumstances.—*Smith v. Kansas City Rys. Co.*, 204 S.W. 575.

⚡280 (7). Care as to passengers who do not pay fare.

**Sup. 1922.** That a passenger, while riding on defendant's railroad, was not an employee and not authorized to receive or use the free pass on which he was riding, did not relieve the carrier who had accepted him as a passenger from using the same degree of care toward him as toward other passengers.—*McGrath v. Payne*, 245 S.W. 1061.

⚡280 (8). Liability as to persons accompanying stock.

**App. 1909.** A shipper of stock was required by his contract to look after it, including the fastening of the car door. While the car was on a side track en route, he went to look after his stock, but, instead of returning to the caboose, where he was supposed to stay, remained in the car all night. A collision occurred during the night which injured him. *Held*, that the carrier's employees had the right to assume that he would not quarter himself in the car, and the company owed him no duty except not to injure him purposely.—*Fusselman v. Wabash R. Co.*, 122 S.W. 1137, 139 Mo. App. 198.

**App. 1921.** Rev. St. 1919, § 9938, requiring carrier to furnish caboose for the transportation of attendant of live stock, does not require railroad to take caboose along with the live stock car to the unloading chute.—*Vulgamott v. Hines*, 229 S.W. 394.

**App. 1928.** Shipper riding on emigrant car with stock *held* not trespasser, though sons were riding without authority (Rev. St. 1919, §§ 9927, 10444).—*Lincoln v. St. Louis San Francisco Ry. Co.*, 7 S.W.(2d) 460.

⚡281. Care as to persons under disability.

**Sup. 1890.** In an action for personal injuries received by plaintiff, a youth nine years old, in alighting from defendant's cable cars, the court properly instructed that, if the jury found plaintiff was a passenger on defendant's car, and that defendant's agents and servants in charge of the car knew at what point he wished to alight, and that, when they reached said point, they did not stop long enough to permit plaintiff, acting

with reasonable care and diligence for one of his years, to alight in safety, and that by reason thereof plaintiff, in attempting to alight, was thrown from said car, and injured, then he is entitled to recover.—*Ridenhour v. Kansas City Cable Ry. Co.*, 14 S.W. 760, 102 Mo. 270, affirming judgment 13 S.W. 889, 102 Mo. 270.

The fact that a passenger is evidently very young is a circumstance that must be taken into consideration by a carrier in the discharge of its duty to stop the car a sufficient length of time to give the passenger reasonable opportunity to alight in safety.—*Id.*

**Sup. 1912.** If the conductor of a street car should have realized that a sudden starting of the car would throw down and injure a corpulent lady of 57 years who was entering the car, and she was accordingly thrown down and injured, the railroad company was liable.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

**App. 1895.** Where the attendant of an intending passenger told the brakeman that the passenger was old and blind and asked him to put her on the train, whereupon the brakeman took hold of her and upon the attendant starting to follow with her baggage was told by the brakeman to get off, a contention that plaintiff's instruction, making it the duty of the brakeman to conduct her to a seat after he knew she was old and blind, were erroneous for the reason that she had an attendant, making such service by the brakeman unnecessary, cannot be sustained.—*Hanks v. Chicago & A. Ry. Co.*, 60 Mo. App. 274.

An instruction that, where an intending passenger on a railroad was old and blind and this fact was made known to defendant's brakeman, it was his duty to conduct her to a seat, and if the train was started before the brakeman attempted to conduct her to such seat and she was thrown from the train in consequence the verdict should be for plaintiff, was correct; it being the duty of the carrier to exercise greater care in case the passenger is old and infirm.—*Id.*

**App. 1910.** Where an old lady in an enfeebled condition boarded a street car, the conductor who had watched her was negligent in giving a signal to start the car before she had had a reasonable time in which to take a seat, rendering the railroad liable for injuries sustained to her by being thrown against the side of a seat by the starting of the car.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1910.** If a common carrier accepts a passenger known to be sick or enfeebled, it is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, which would be such a degree of care as is reasonably necessary to protect the passenger from injury, in view of his physical condition.—*Trout v. Watkins Livery & Undertaking Co.*, 130 S.W. 136, 148 Mo. App. 621.

**App. 1912.** That a passenger was in a weakened condition in consequence of illness will not prevent a recovery for injury resulting from the failure of the carrier to provide the car with reasonably sufficient heat for a person in ordinary health.—*Roark v. Missouri Pac. Ry. Co.*, 147 S.W. 499, 163 Mo. App. 705.

**App. 1913.** Where a carrier's agents and servants have notice that a passenger's physical condition is such as to require assistance to him in alighting from the car, and request for such assistance is made, it is its duty to render such assistance as is necessary to protect him from injury, though such notice was received after he had been accepted as a passenger.—*Layne v. Chicago & A. R. Co.*, 157 S.W. 850, 175 Mo. App. 34.

**App. 1915.** A carrier owes to a passenger in ill health the highest degree of care.—*Gillogly v. Dunham*, 174 S.W. 118, 187 Mo. App. 551.

#### ←282. Persons to whom carrier is liable.

Affecting sufficiency of evidence as to negligence, see post, ←318.

Care as to persons accompanying passengers, see post, ←304.

Who are passengers, see ante, ←237-246.

**Sup. 1875.** Want of ordinary care on the part of railway employés, causing injuries to a person who was at the train to meet or part from a passenger, will render the railway company liable, although the person injured was not himself an employé or passenger.—*Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371.

**Sup. 1878.** A gratuitous passenger may recover from a carrier for injuries occasioned by its gross neglect.—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

**Sup. 1892.** A boy six years old was invited on a street car by the conductor, and in alighting was injured because of the negligence of the latter. *Held*, that the company



was liable in damages for such negligence, though the boy paid no fare.—*Buck v. People's Street-Railway & Electric Light & Power Co.*, 18 S.W. 1090, 108 Mo. 179, affirming judgment (1891) 46 Mo. App. 555.

**Sup. 1893.** Where a person intentionally hid himself on a car, knowing that he would not be permitted to ride if his presence was discovered, the railroad company owed him no duty of care by reason of any special relation assumed or existing between him and the company, save that it would not willfully or recklessly injure him after discovering him on the train.—*Farber v. Missouri Pac. Ry. Co.*, 22 S.W. 631, 116 Mo. 81, 20 L. R. A. 359.

**Sup. 1901.** In an action for injuries to a person riding on a freight train it was no defense that plaintiff was guilty of forgery, by reason of the fact that he was riding on a mileage ticket issued to another, and that he signed such other's name to the part detached by the conductor in payment of his fare, where it appeared that the owner of the ticket authorized plaintiff to so sign his name.—*Merrilees v. Wabash R. Co.*, 63 S.W. 718, 163 Mo. 470.

**Sup. 1902.** Unless the damages complained of in an action to recover damages for the death of one killed in a railroad wreck arise out of a failure to perform a legal duty to the person injured, there is no cause of action. It is not necessary that the duty be owing to the person in particular, but it is sufficient if it be owing to a class which embraces him, or to the public where he is concerned.—*Feedback v. Missouri Pac. R. Co.*, 66 S.W. 965, 167 Mo. 206.

**Sup. 1918.** Mere fact that, when prospective passenger on freight train trespassed on part of right of way not intended for his use, he was not ejected, did not make him invitee to go into same place second time, especially where dangerous condition was obvious.—*Hamilton v. Pryor*, 201 S.W. 550, L. R. A. 1918D, 212.

**App. 1881.** If a person by fraud or stealth gets upon a carrier's vehicle without the knowledge of the carrier or his servant, and is either killed or injured through the negligence of the carrier or his servant, no action can be maintained for such death or injury.—*Siegrist v. Arnot*, 10 Mo. App. 197.

**App. 1891.** Where a freight train which stopped at flag stations on signals in order to take on passengers was so signaled to stop,

and plaintiff endeavored to board the train while it was in motion, the train having slowed down, the relation of passenger and carrier existed.—*Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

**App. 1909.** The general duty of a carrier to run its train with care does not become a duty to a particular person until he is in a position to have the right to complain.—*Fusselman v. Wabash R. Co.*, 122 S.W. 1137, 139 Mo. App. 198.

**App. 1910.** If the relation of passenger and carrier has ceased to exist, the liability of the carrier for the act of the servant in assaulting a passenger no longer exists.—*Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402.

**App. 1910.** A carrier is bound to exercise the same degree of care with reference to preventing injury to a postal clerk employed on its trains as it is bound to exercise with reference to passengers.—*Dunlap v. Chicago, R. I. & P. Ry. Co.*, 129 S.W. 262, 145 Mo. App. 215.

**App. 1911.** A street car company maintaining a viaduct exclusively for street car traffic, and maintaining a sign 92 feet away from the end of the viaduct to warn trespassers, need not anticipate that a person not a passenger will attempt to ride on the car after it has started to run over the viaduct, and to hang onto the car until he is struck by a part of the sign, since it owes no duty to such person other than that of not wantonly or negligently injuring him after the discovery of his peril.—*Mathews v. Metropolitan St. Ry. Co.*, 137 S.W. 1003, 156 Mo. App. 715.

**App. 1912.** Where plaintiff was riding on defendant's freight train with consent of its conductor, defendant was bound to exercise only ordinary care for his safety.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83. See Railroads, 276(4) in this Digest.

**App. 1913.** A shipper of live stock who accompanied it, and was advised that it would be necessary to pass over railroad yards to board the caboose at the distant point it was placed, was not a trespasser in going from the station to board the caboose, and it was the duty of the carrier to use reasonable care to make the premises reasonably safe.—*Chorn v. Missouri, K. & T. Ry. Co.*, 153 S.W. 1060, 168 Mo. App. 518.

**App. 1913.** A mail clerk assumes the risk of injuries incident to his transportation in

a mail car, though the carrier is required to exercise toward him the same high degree of care generally imposed in favor of passengers.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S.W. 327, 178 Mo. App. 579.

**App. 1914.** One who boards a moving street car contrary to the street railway company's express rules is not a passenger, and, though he be in a position of danger, the street railway company's servants are bound only to use ordinary care to avoid injuring him after discovering his peril.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 149 Mo. App. 311.

**App. 1921.** Where the conductor makes a sudden, unprovoked, wilful, and malicious assault on one riding on rear of street car, without warning, and without affording him an opportunity either to pay his fare or to leave the car in safety, the injured person is entitled to recover, regardless of whether or not the relation of passenger and carrier exists.—*Lampe v. United Rys. Co. of St. Louis*, 232 S.W. 249, 209 Mo. App. 357.

### ←283. Acts or omissions of carrier's employés.

Admissibility of evidence, see post, ←317.

Contributory negligence, see post, ←336.

Damages, see post, ←319(3).

Ejection of passengers and intruders, see post, ←352.

Instructions, see post, ←321.

Proximate cause of injury, see post, ←305.

Questions for jury, see post, ←319, 320(2).

Sufficiency of evidence, see post, ←318.

Termination of relation of carrier and passenger, see ante, ←247, 282.

### ←283 (1). Who are employés.

**App. 1911.** A railway company is liable for assault upon a passenger by its operator, though incidentally he worked as operator for an independent telegraph company, and though the passenger called to send a private message.—*Roberts v. Wabash R. Co.*, 134 S.W. 89, 153 Mo. App. 638.

**App. 1912.** A railroad company was liable for an assault committed by an employé acting as a special policeman charged with the duty of enforcing the company's rules, and receiving all his compensation from the company.—*Hedge v. St. Louis & S. F. R. Co.*, 145 S.W. 115, 164 Mo. App. 291.

**App. 1919.** Where a street railway company was the only company having the right to operate cars in a city, the fact that the

motorman and conductor of an interurban railway were in the latter's general service did not prevent them from being the servants of the street railway in operating a car of the interurban railway over the street railway's city tracks under an operating agreement between the companies to that end, which agreement was pursuant to ordinance as to such operation.—*Wilcox v. Kansas City Western R. Co.*, 213 S.W. 156, 201 Mo. App. 510.

### ←283 (2). For what acts of employé carrier liable in general.

**Sup. 1890.** A railroad company is liable for injuries sustained by a passenger in jumping from a moving train, to which he is impelled by fear of injury to life or limb, induced by the conductor joining with others in simulated threats to rob the passenger, blind him, and throw him from the train.—*Spohn v. Missouri Pac. Ry. Co.*, 14 S.W. 880, 101 Mo. 417.

**Sup. 1895.** Where the brakeman stationed at the brake in the cupola of a caboose car, and so able to see up and down the track, on a signal for "Down brakes," excitedly and recklessly calls to the passengers in the car to "Jump!" "Jump for your lives!" the company is liable for injuries to persons jumping from the moving train, though there is no real danger, and it is not one of the brakeman's duties to warn passengers of danger.—*McPeak v. Missouri Pac. Ry. Co.*, 30 S.W. 170, 128 Mo. 617.

**Sup. 1897.** A railroad company, while running a mixed train, is answerable for damages resulting to a passenger from jumping from the train on account of the negligent and terrifying acts of one of its brakemen, made in the car in which he was being carried, and from which he might reasonably infer that a wreck of the train was imminent, though such brakeman had no express duty to perform in or about such car, or in the direction of passengers, and no real danger was imminent.—*Ephland v. Missouri Pac. Ry. Co.*, 37 S.W. 820, 137 Mo. 187, 35 L. R. A. 107, 59 Am. St. Rep. 498, rehearing denied 38 S.W. 926, 137 Mo. 187, 35 L. R. A. 107, 59 Am. St. Rep. 498.

**App. 1885.** For the abuse, mistreatment, and injury of and to a passenger by a conductor the railroad corporation is as much liable as if done by its organized board of directors.—*Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609.

**App. 1895.** Plaintiff, who was riding in a box car with stock which he was shipping,

went to the caboose and asked the conductor for some oil to fill his lantern, which was necessary to enable him to care for the stock. The conductor told him to come to the caboose at the next stop and he would give it to him, and in so doing, in the dark, he fell into a culvert and was injured. *Held*, that plaintiff was entitled to recover, the conductor acting in the line of his duty in directing plaintiff to come to the caboose, and, knowing it was dark, should not have stopped the train over the culvert.—*Nurse v. St. Louis & S. F. Ry. Co.*, 61 Mo. App. 67.

**App. 1897.** It is the duty of a brakeman on a mixed train to assist in stopping the train, whether an ordinary stop or for the purpose of averting an accident, and if in the performance of such duty he willfully and maliciously terrorizes and injures passengers, the carrier is liable.—*Ephland v. Missouri Pac. Ry. Co.*, 71 Mo. App. 597.

**App. 1903.** Where a street car conductor, acting within the scope of his employment, commits a malicious tort against a passenger, the company is liable to the same extent as an individual would be.—*Grayson v. St. Louis Transit Co.*, 71 S.W. 730, 100 Mo. App. 60.

**App. 1909.** The inference that a car repairer negligently pushed up a car door which he had been requested to repair by the shipper accompanying the car, whereby it was caused to fall on the shipper and injure him, is unwarrantable, where it does not appear that it was unnecessary to lift the door to see how it could be repaired, or that it was unskillfully lifted.—*Jones v. St. Louis, I. M. & S. Ry. Co.*, 116 S.W. 4, 135 Mo. App. 468.

**App. 1912.** A railroad company *held* liable for the intentional acts of its switchmen in the performance of their duties as such.—*Richmond v. Missouri Pac. Ry. Co.*, 144 S.W. 168, 162 Mo. App. 422.

**App. 1913.** Where a traveler enters a taxicab, which is the vehicle of a common carrier, the relation of passenger and carrier is established, and the carrier becomes bound to protect him, not only from insult and assault by outsiders, but from its own servants.—*Van Hoefen v. Columbia Taxicab Co.*, 162 S.W. 694, 179 Mo. App. 591.

**App. 1913.** A passenger is entitled to decorous treatment from the carrier, and it is liable if its servants assault or insult him.—*Fornoff v. Columbia Taxicab Co.*, 162 S.W. 699, 179 Mo. App. 620.

**App. 1919.** Where passenger on platform was requested by brakeman to help in lifting a barrel, conductor was not required to forbid passenger to give such help where there was no inherent danger in the work and no reason to anticipate danger.—*Shaffer v. St. Louis & S. F. Ry. Co.*, 208 S.W. 145, 201 Mo. App. 107.

#### 283 (3). Assault or personal violence.

**Sup. 1893.** The relation of carrier and passenger places the former under the obligation to carry the passenger safely and properly, and treat him respectfully, and it is bound to protect him from violence and insults by its servants.—*Farber v. Missouri Pac. Ry. Co.*, 22 S.W. 631, 116 Mo. 81, 20 L. R. A. 350.

**Sup. 1904.** An instruction that if plaintiff's intestate, who died from injuries inflicted by the conductor of a street car, pulled the conductor off the car the latter was entitled to strike deceased in resistance thereof, and if deceased succeeded in pulling the conductor from the car, and then engaged in a physical conflict with him, the conductor was entitled to resist any assault that deceased made on him, and, even if the conductor did more than was necessary to resist such assault and in doing so shot deceased, the carrier was not liable for its conductor's conduct, was proper.—*O'Brien v. St. Louis Transit Co.*, 84 S.W. 939, 185 Mo. 263, 105 Am. St. Rep. 592.

An instruction that, though the conductor voluntarily followed deceased from the car, and thereafter engaged in a physical conflict with him, and as a result thereof deceased was shot by the conductor, yet such voluntary act of the conductor was no part of his duty as conductor, and defendant was not liable for the consequences thereof, was erroneous.—*Id.*

An instruction that if deceased, just before alighting from the car, called the conductor vile names, and struck him, and the conductor, in resenting the insult and repelling the assault, struck deceased, and deceased dragged the conductor from the car, and was shot in a fight which ensued on the ground away from the car, from which shooting deceased died, plaintiff was not entitled to recover, was proper.—*Id.*

An instruction that if deceased struck the conductor before the latter had made any assault upon him, and a fight ensued on the street, off the car, during which the conductor shot and killed deceased, defendant was not liable, was erroneous; for if after striking the conductor, deceased attempted to get off

the car, and the conductor held and beat him, and then followed him off the car, and killed him, the carrier would be liable.—*Id.*

**Sup. 1908.** That a passenger brought on the altercation in which he was shot and killed by the conductor in charge of defendant's street car will not preclude a recovery against the carrier under Rev. St. 1899, § 2864, for the passenger's death.—*O'Brien v. St. Louis Transit Co.*, 110 S.W. 705, 212 Mo. 59, 15 Ann. Cas. 86.

**Sup. 1919.** Though conductors of railway cars, both street and steam, cannot lawfully assault a passenger, their position and employment do not deprive them of the right of self-defense; and, if wrongfully assaulted, they have the same right of self-defense accorded to the ordinary citizen.—*Wiard v. Dunham*, 210 S.W. 873.

**Sup. 1922.** If a person on a car is assaulted and wantonly injured by conductor it would not matter as respects the carrier's liability whether he was a passenger or not.—*State ex rel. United Rys. Co. of St. Louis v. Allen*, 240 S.W. 117.

**App. 1884.** Repelling assault by passenger. See *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584, memorandum.

**App. 1903.** A carrier is liable where plaintiff, after a street car had stopped for the purpose of receiving passengers, and while still, or slowly moving, attempted to get on, and was violently and without provocation assaulted by the conductor, causing plaintiff to fall from the car, whereby he sustained injuries.—*Strauss v. St. Louis Transit Co.*, 77 S.W. 156, 102 Mo. App. 644.

**App. 1903.** The carrier is not liable to a passenger for assault and battery, who, from having assaulted the conductor, and using a crowbar in a threatening manner, is injured in a street car by the conductor, using such force only as necessary to repel the assault.—*Ickenroth v. St. Louis Transit Co.*, 77 S.W. 162, 102 Mo. App. 597.

**App. 1904.** Where a conductor, while engaged in the service of a street railway company, in charge of one of its cars, willfully assaulted a passenger, the company, though a corporation, is liable therefor.—*O'Donnel v. St. Louis Transit Co.*, 80 S.W. 315, 107 Mo. App. 34.

**App. 1907.** Offensive language by a street car passenger will not justify the conductor in assaulting him, however insulting

or opprobrious, though evidence thereof may be given in mitigation of damages.—*Mitchell v. United Railways Co.*, 102 S.W. 661, 125 Mo. App. 1.

**App. 1908.** Where a railway brakeman, while looking after the train, assaulted a passenger whom he found in a freight car instead of in the passenger coach where he should have been, the assault was committed within the scope of the brakeman's employment, and the carrier was liable for his act.—*Keen v. St. Louis, I. M. & S. R. Co.*, 108 S.W. 1125, 129 Mo. App. 301.

A carrier is absolutely bound to protect a passenger from unlawful assaults by its servants.—*Id.*

**App. 1910.** The rule that the master is not liable for the torts of the servant, unless the act itself pertains to the service for which the servant is employed, does not apply to an assault on a passenger by a carrier's servant, in which case the carrier's liability arises, not out of the relation of master and servant, but out of that of carrier and passenger; the carrier being bound to protect the passenger against assaults, not only of its servants, but of third persons.—*Shelby v. Metropolitan St. Ry. Co.*, 125 S.W. 1180, 141 Mo. App. 514.

**App. 1910.** Though one person may instigate a combat by insulting language or conduct, still the law does not justify his adversary on the plea of self-defense in the use of unnecessary force, and this rule applies to assaults made by street car conductors on passengers.—*Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402.

A carrier is liable for the acts of its conductor in assaulting a passenger while engaged in the performance of his duty as such, precisely as the conductor himself would be.—*Id.*

**App. 1912.** A railroad company was liable for an assault committed by an employé acting as a watchman with the knowledge of the local agents for the company, though his primary duties were inspecting and repairing engines.—*Hedge v. St. Louis & S. F. R. Co.*, 145 S.W. 115, 164 Mo. App. 291.

**App. 1913.** Where the operator of a taxicab, who was intrusted with collection of fares, assaulted a passenger, and held him prisoner until a higher fare than that agreed upon was finally paid, the taxicab company cannot escape liability on the ground that the acts of the operator were without the scope of

his authority.—*Van Hoefen v. Columbia Taxicab Co.*, 162 S.W. 694, 179 Mo. App. 591.

Where the driver, and another in charge of a taxicab, held plaintiff, a passenger, prisoner in the cab for some time until he was finally able to force open the door and alight, and they then caught him and held him prisoner on the pavement until he was compelled to pay an excessive fare, the assault was a continued one, beginning with the imprisonment in the cab.—*Id.*

Where the servant of a common carrier falsely imprisons a passenger while the passenger is yet in the vehicle, and after the passenger alights the assault is renewed, the law will not undertake to determine whether the assault after the passenger alighted was beyond the servant's employment.—*Id.*

**App. 1914.** A threat by a passenger to report the conduct of the conductor of a street car does not justify the conductor in assaulting the passenger.—*Sterneman v. Springfield Traction Co.*, 163 S.W. 238, 178 Mo. App. 64.

Where the conductor of a street car assaulted a passenger before the latter had debarked, and after he had knocked the passenger to the ground he continued the assault, the company was liable also for the continued assault.—*Id.*

**App. 1914.** Where a railroad ticket agent assaulted a passenger trying to induce the agent to return his change for a ticket purchased, the assault was within the scope of the ticket agent's employment, and defendant is liable therefor.—*Bledsoe v. West*, 171 S. W. 622, 186 Mo. App. 400.

**App. 1914.** That a brakeman's deliberate and unprovoked assault on a passenger on a train was merely in furtherance of a personal grudge does not exonerate the carrier from liability.—*Winston v. Lusk*, 172 S. W. 76, 186 Mo. App. 381.

**App. 1917.** Where a conductor before stopping his train takes hold of a passenger to eject her for failure to pay her fare, he is guilty of an assault rendering the company liable in damages.—*Briggs v. Lusk*, 190 S.W. 380.

**App. 1919.** In view of the power given railroad companies by Rev. St. 1909, § 3093, to eject disorderly passengers, a conductor may not assault a boisterous and drunken passenger and whip him, allowing him to continue his journey.—*Parris v. Deering South-*

*western Ry. Co.*, 208 S. W. 97, 203 Mo. App. 182.

**App. 1921.** If a passenger assaults a conductor, the latter has a right to defend himself, and if in a personal combat between them, brought on by the passenger's wrongful assault, the passenger is injured, the carrier will not be liable, provided in repelling the attack the conductor uses no more force to repel the attack than is reasonably necessary for his defense and the protection and orderly conduct of the carrier's business, and where the carrier seeks to justify the assault it is incumbent upon it to show that no more force was used than was necessary under the circumstances.—*Parris v. Deering Southwestern R. Co.*, 227 S. W. 1071.

**App. 1923.** An assault by a railroad employee on a passenger is entirely excused only when the passenger's provocative conduct is such as in law amounts to a justification of the assault on the ground of self-defense, but where less than this, evidence of provocation is admissible in mitigation of damages only.—*Hunter v. Kansas City Rys. Co.*, 248 S.W. 998, 213 Mo. App. 233.

#### 283 (4). Abusive and insulting language.

**App. 1902.** Street railway companies' employes must treat passengers with respect, and not subject them to insult and violence.—*Murphy v. St. Louis Transit Co.*, 70 S.W. 159, 96 Mo. App. 272.

**App. 1903.** Plaintiff, while a passenger with his son on a street car, in answer to a question from the conductor, said his son was 9 years of age, whereupon the conductor answered: "You can't give me a stiff like that. He is 14 years old;" thereby charging plaintiff with lying. *Held*, that the company was not liable.—*Grayson v. St. Louis Transit Co.*, 71 S.W. 730, 100 Mo. App. 60.

**App. 1917.** Conceding that ticket agent made honest mistake, it would not relieve railroad if agent was insulting in insinuating that plaintiff was attempting to obtain ticket without paying therefor.—*Knoell v. Kansas City, C. C. & St. J. Ry. Co.*, 198 S.W. 70.

#### 283 (5). Number and efficiency of servants

**Sup. 1890.** A street-railway company is liable for injuries to passengers caused by its failure to employ a skillful conductor and gripman.—*Olsen v. Citizens' Ry. Co.*, 54 S.W. 470, 152 Mo. 426.

←284. Acts of fellow passengers or other third persons.

See post, ←286.

←284 (1). Duty to protect passenger from acts of fellow passengers.

**Sup. 1885.** It is the duty of a railroad company and its conductor to use the utmost vigilance and care in maintaining order and in protecting passengers from violence and insults from others, though such other persons be passengers, and a failure to do so will render the company liable for damages to a passenger injured by reason of such neglect.—*Spohn v. Missouri Pac. Ry. Co.*, 87 Mo. 74.

In an action against a railroad for an injury coming from or threatened by another passenger, it is necessary for plaintiff to show that the conductor or other person in charge of defendant's train knew of the threatened injury, or from the character and number of persons on board and the surrounding circumstances might reasonably have anticipated the injury.—*Id.*

**Sup. 1890.** A carrier of passengers by railroad is bound to use the utmost practicable care, not only to safely transport its passengers, but to protect them in transit from violence and insults from those on the train, including fellow passengers, and a failure to do so will render the carrier liable for any damage naturally and directly resulting therefrom.—*Spohn v. Missouri Pac. Ry. Co.*, 14 S.W. 880, 101 Mo. 417.

**Sup. 1893.** The mere fact that a male passenger, in the hearing of the conductor, offered to conduct plaintiff to an hotel, is not sufficient to suggest to the conductor the danger of assault and ravishment, so as to render the company liable therefor.—*Sira v. Wabash R. Co.*, 21 S.W. 905, 115 Mo. 127, 37 Am. St. Rep. 388.

**Sup. 1896.** Plaintiff was a passenger on one of defendant's summer street cars. Defendant's driver acted also as conductor. A fellow passenger inadvertently threw a lighted match on plaintiff's dress, which blazed up suddenly. The driver immediately stopped the car, but before he could render any assistance to plaintiff she had left the car from the rear door, and was severely burned before the flames were extinguished. *Held*, that defendant was not chargeable with negligence.—*Sullivan v. Jefferson Ave. Ry. Co.*, 34 S.W. 566, 133 Mo. 1, 32 L. R. A. 167.

**Sup. 1918.** Where conduct of intoxicated passenger prior to assault on plaintiff was

not such as to warn those in charge of train, or any one else on car, that he intended to assault any one, the defendant railroad company was not liable for his assault on plaintiff.—*Lige v. Chicago, B. & Q. R. Co.*, 204 S.W. 508, 275 Mo. 249, L. R. A. 1918F, 548.

**App. 1919.** Where a disorderly passenger assaults a fellow passenger it is the duty of the railroad company's servants to protect the latter, and they may use such force as is necessary, but they are not justified in assaulting a passenger who is guilty merely of boisterous and indecent conduct, but should eject him.—*Parris v. Deering Southwestern Ry. Co.*, 208 S.W. 97, 203 Mo. App. 182.

**App. 1920.** A carrier owes to each passenger the highest practical degree of care to protect him from insults and violence at the hands of other passengers, and on account of the well-known tendency of persons who are intoxicated to offer insults by words and acts, and to commit acts of violence toward others, this duty of a carrier becomes much greater in degree in such cases, since the degree of care rises with the degree of danger.—*Abernathy v. Missouri Pac. R. Co.*, 217 S.W. 568.

The mere fact that a passenger receives injury at the hands of another passenger, who is intoxicated, does not make out a case of liability, a carrier in such a case not being an insurer, but only required to guard against that which a very careful person would anticipate as likely to happen; and where there is nothing in the conduct or known disposition of the passenger, other than mere intoxication, to warn the trainmen that he is likely to become violent or insulting towards another passenger, then the carrier is not liable for sudden acts of such character.—*Id.*

If a drunken or disorderly man is on a carrier's vehicle, the carrier will not be allowed to say, after a passenger has been subjected to insult or injury, that the carrier's servants did not know or could not have foreseen that the particular individual who was insulted was in danger of such an insult or injury, if they were apprised, or with proper care could have known, of circumstances which indicated that some one would be injured unless the disorderly passenger were ejected or controlled.—*Id.*

**App. 1921.** The duty of a common carrier to exercise the utmost care to safely transport passengers and to protect them while in transit from insult and violence at the hands of all on the conveyance, including

fellow passengers, is not a duty amounting to an absolute guaranty that a passenger will be transported absolutely safe to his destination, or that he will not be insulted or injured by a fellow passenger while in transit, but means that those in charge of the conveyance must use the highest degree of care consistent with the business, to ascertain and prevent such injuries; and the carrier is not liable for an injury to a passenger caused by an impending danger, when not discernible by the exercise of that degree of care.—*Liljegren v. United Rys. Co. of St. Louis*, 227 S.W. 925.

Where conductor of a street car had good reason to believe that an intoxicated passenger would assault and kiss plaintiff, by reason of assaults on other passengers, it was his duty to take steps toward ejecting such intoxicated person; such course appearing to be the only appropriate means of protecting the other passengers in the car from insult and violence.—*Id.*

**App. 1921.** A carrier's failure to adopt reasonable expedients to avoid danger from crowds struggling to get on its cars is negligence rendering it liable for injury thus proximately caused.—*Grubb v. Kansas City Rys. Co.*, 230 S.W. 675, 207 Mo. App. 16.

It is the duty of the carrier to exercise the highest practical degree of care, and not merely ordinary care to protect its passengers from violence or injury from other passengers.—*Id.*

In a passenger's action for personal injury resulting from being pushed under a moving car by a crowd of intending passengers, defendant's claim that the method of protecting passengers observed on this occasion had been followed for a long time with no untoward results, and hence there was no negligence, cannot be upheld, since a mere negligent method for a long period of time, free from injuries, does not establish a correct standard of care and safety, particularly where evidence shows such method had not always been followed.—*Id.*

**284 (2). Acts of third persons in general.**

**Sup. 1893.** A carrier is bound to protect his passengers from violence and insults by strangers and co-passengers.—*Farber v. Missouri Pac. Ry. Co.*, 22 S.W. 631, 116 Mo. 81, 20 L. R. A. 350.

**Sup. 1918.** A common carrier of passengers for hire is bound to exercise utmost practicable care to safely transport its passen-

gers, and to protect them while in transit from insults and violence at the hands of all on the train, including fellow passengers.—*Lige v. Chicago, B. & Q. R. Co.*, 204 S.W. 508, 275 Mo. 249, 1 L. R. A. 1918F, 548.

**App. 1903.** Where a street car conductor stopped his car for two ladies to get off, and after one got off, but before the other had done so, some one not in the employ of the railway company, nor with the authority or knowledge of the conductor, gave the motor-man the signal to start, and he did so, throwing the second lady to the ground, there was no negligence on the part of the railway company, and such passenger could not recover from the company for the injury so sustained.—*Krone v. Southwest Missouri Electric Ry. Co.*, 71 S.W. 712, 97 Mo. App. 609.

**App. 1906.** The duty of a carrier to exercise the highest degree of care to protect a passenger from assaults, whether offered by strangers or by the carrier's servants, continues until the passenger has left the vehicle in safety at his destination.—*McQuerry v. Metropolitan St. Ry. Co.*, 92 S.W. 912, 117 Mo. App. 255.

**App. 1910.** A carrier is under no obligation to protect a passenger from the criminal assault of persons in no way connected with the carrier, and which assault there was no reason to anticipate.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

**App. 1921.** Where a carrier has permitted third persons to enter on its premises, or cars, and become passengers thereof, the carrier is required to exercise the utmost vigilance to protect the passengers from insult and injury arising from others who occupy similar relations with respect to the party injured, but a different rule prevails with respect to the carrier's liability for injuries to passengers who receive injuries from the acts of persons beyond the control of the carrier, and for which it is in no way responsible, in which case the carrier is only required to exercise ordinary care and vigilance to discover and prevent injury to passengers.—*Williams v. East St. Louis & S. Ry. Co.*, 232 S.W. 759, 207 Mo. App. 233.

A carrier operating electric lines into East St. Louis at the time mobs were lynching negroes there should have anticipated that negroes boarding the car out of the city, bound for the city, was likely to be subjected to tortures and ill treatment if brought into the city.—*Id.*

**App. 1024.** Where one offered himself as elevator passenger on first floor of a public building and was carried to fourth floor by regular operator, there was an implied obligation to take him down, and hence, in action under Rev. St. 1919, § 4217, for death of such passenger, based on negligent condition of elevator and negligence of operator in operating elevator, fact that alleged trespasser was operating elevator at time of passenger's death did not relieve defendant from liability.—*Williams v. Short*, 268 S.W. 706, 219 Mo. App. 99, transferred from Supreme Court, 263 S.W. 200.

⚡284(3). **Liability for acts of postal clerk.**

**App. 1800.** Where the operatives of a train permitted one who was not employed by the railroad company to throw a switch, and he did it in such a manner as to cause an injury to a passenger, the carrier was liable for such injury.—*Olmitt v. Hannibal & St. J. Ry. Co.*, 40 Mo. App. 654.

⚡284(4). **Liability for negligence of other carrier.**

**Sup. 1902.** A passenger on his way to New York inquired of a porter standing beside a train whether it was the New York one, and, receiving an affirmative answer, and an invitation to get on, boarded it, but then, learning that it was a train on another road, jumped off while it was in motion. He alighted on the platform at a point where it was greasy, slipped, and was injured. The train from which he jumped was operated by a different road than the one owning and conducting the depot. *Held*, in an action against the latter road, that it was error to charge that, before plaintiff could recover, the jury must find defendant's negligence to be the sole cause of the injury, it being liable if its negligence concurred with that of the other road.—*Newcomb v. New York Cent. & H. R. R. Co.*, 69 S.W. 348, 169 Mo. 409.

**App. 1911.** A flagman stationed at a railroad crossing used by a street railway company is the agent of the latter, and it is liable for his negligence in signaling a motorman to cross.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

⚡285. **Act of God, vis major, or inevitable accident.**

Duty to take precautions as to track, see post, ⚡291.

Instructions, see post, ⚡321.

**Sup. 1866.** Carriers of passengers, not being insurers of their safety, are not responsi-

ble, where all reasonable care, skill, and diligence have been employed for mere accident or misadventure any more than for the act of God or the public enemy.—*Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

A railroad company is not liable for an injury to a passenger caused by the precipitation of a train into a chasm, the bridge over which had been burnt by the public enemy, if the officers in charge of the train had no means of knowing that the bridge had been burnt, and used as much care and diligence as a very prudent and careful man would have exercised where his own interest and safety were concerned.—*Id.*

**Sup. 1882.** Since carriers of passengers are not insurers, and are not responsible for accidents when all reasonable skill and diligence have been employed, and when everything has been done which human foresight can suggest, an instruction authorizing a verdict against a carrier, for a personal injury to a passenger, by being struck by a door falling from its place on the car, if the door could have been kept from falling, and the carrier used the greatest possible care and diligence in reference to the door, was erroneous.—*Gilson v. Jackson County Horse Ry. Co.*, 76 Mo. 282.

**Sup. 1882.** In an action against a railroad company for the death of a passenger, it was shown that the death of the passenger resulted from a sudden and unknown weakening of the railroad track in consequence of an unprecedented rainstorm. There was no negligent defect in the car in which the deceased was riding, nor in any other portion of the train. There was no defect in the construction of the roadway. The engineer had no notice of the extraordinary violence of the rainstorm before reaching the place of the accident, but on arriving there he found the water within a few inches of the ties, and in the pond over which the track ran from 3 to 3½ feet higher than he had ever seen it before. *Held* that, if the engineer had reason to believe that the water had been higher than it was when he reached the place, or that it had remained at the height at which he saw it long enough to soften the earth on which the ties rested, plaintiff was entitled to recover.—*Ellet v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 518.

**Sup. 1913.** A carrier of passengers is liable for injury to passengers from all causes except injuries resulting from the act of God or the public enemy, or from the operation of



the elements including storm and flood.—*Hurck v. Missouri Pac. Ry. Co.*, 158 S.W. 581, 252 Mo. 39.

**App. 1870.** Where an injury is caused by an act of God operating jointly with the negligence of a carrier, but the negligence of the carrier only remotely or indirectly contributes to the effect, the carrier is not liable.—*Gillespie v. St. Louis, K. C. & N. Ry. Co.*, 6 Mo. App. 554.

A carrier is required to exercise only such foresight and care in preventing or averting the effect of an act of God as ordinarily prudent persons in the same business would use under all the circumstances of the case.—*Id.*

In an action against a carrier for injuries to a passenger caused by the washing away of a part of the roadbed by a heavy rain storm, an instruction that, if defendant so constructed its roadbed that it was liable to be washed away by a heavy rain storm, it was immaterial how sudden or extraordinary the rain storm may have been, is erroneous.—*Id.*

286. **Condition and use of premises.** Care as to persons accompanying passenger, see post, 304(2). Contributory negligence of persons injured, see post, 327. Instructions, see post, 321. Persons accompanying passengers, see post, 304(2). Questions for jury, see post, 320.

286 (1). **In general.**

**Sup. 1894.** A carrier of passengers owes to those approaching or leaving its trains the duty of keeping its station platform in a reasonably safe condition for convenient use, and is liable to such persons who are themselves careful for damages sustained by reason of its negligence in not observing its duty.—*Fullerton v. Fordyce*, 25 S.W. 587, 121 Mo. 1, 42 Am. St. Rep. 516.

When, by the breaking of a plank in a station platform, a hole six feet long and eight inches wide is made, which, though it could be repaired in a few minutes, is left four days unmended and unguarded, the railroad company is liable to a passenger injured thereby.—*Id.*

**Sup. 1897.** When by the breaking of a plank in a station platform, a hole six feet long and eight inches wide was made, which, though it could be repaired in a few minutes, was left four days unmended and unguarded,

the railroad company was guilty of negligence, as a matter of law, as against a passenger injured thereby.—*Fullerton v. Fordyce*, 44 S.W. 1053, 144 Mo. 519.

**Sup. 1898.** In an action for death of a passenger caused by his falling from the platform of an elevated station owing to the absence of a sufficient railing, plaintiff was not bound to show what space ordinarily is left between the cars and railing by other companies like defendant.—*Barth v. Kansas City El. Ry. Co.*, 44 S.W. 778, 142 Mo. 535.

**Sup. 1899.** A carrier is bound only to keep a depot platform in a reasonably safe condition for passengers.—*Robertson v. Wabash R. Co.*, 53 S.W. 1082, 152 Mo. 382.

**Sup. 1909.** A carrier must exercise ordinary and reasonable care in the construction and maintenance of station platforms, including a railing extending from the end of a platform parallel with the track across a viaduct.—*Joyce v. Metropolitan St. Ry. Co.*, 118 S.W. 21, 219 Mo. 344.

**Sup. 1916.** A carrier held not liable to a passenger who accidentally fell from platform of its depot at a point of depression caused by a descent of ground, but not causing a sufficient elevation to render it dangerous.—*Hueston v. Quincy, O. & K. C. Ry. Co.*, 189 S.W. 1170.

**App. 1881.** It is the duty of railway companies to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station ground reasonably near to their platforms.—*Chance v. St. Louis, I. M. & S. Ry. Co.*, 10 Mo. App. 351.

**App. 1886.** The law requires railroads to provide reasonably safe landings for passengers.—*Stafford v. Hannibal & St. J. R. Co.*, 22 Mo. App. 333.

**App. 1894.** A carrier of passengers is required to exercise a great degree of care in taking care of its passengers, and it is its duty to keep in a reasonably safe condition its platforms and approaches thereto, to which the passengers would naturally resort, as well as every part of their station grounds reasonably near to the platform where passengers or those who have purchased tickets with a view of taking passage on its cars would ordinarily be likely to go.—*Gunderman v. Missouri, K. & T. Ry. Co.*, 58 Mo. App. 370.

**App. 1906.** A passenger, when invited by the carrier, may leave the train at a meal sta-

tion to obtain a meal, and on such occasions he may walk alongside of the train for relaxation, and if he is injured while in the exercise of reasonable care, by a defect existing at a place the carrier should have anticipated would be used for such purpose, it is liable.—*Laub v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 550, 118 Mo. App. 488.

**App. 1910.** A railroad company must keep the platform at a station on which it invites passengers to alight in good condition, and is liable for accidents to passengers alighting from its train by reason of a defect in the platform.—*McClanahan v. St. Louis & S. F. R. Co.*, 126 S.W. 535, 147 Mo. App. 386.

**App. 1911.** A railroad company is only bound to use ordinary care to keep its platforms and approaches in a safe condition for passengers, and, if a defect in a platform was not directly caused by its servants, it must be shown that it or its servants knew, or by the exercise of ordinary care could have known, of the defect, in time to have had reasonable opportunity to repair it, and failed to do so, in order to make the company liable for injuries to a passenger therefrom.—*Munro v. St. Louis & S. F. R. Co.*, 135 S.W. 1016, 155 Mo. App. 710.

**App. 1911.** Where a hole over three feet long, six inches wide, and twelve inches deep had remained in a depot platform for three or four weeks, it had existed long enough for the carrier, in the exercise of the care it owed to its passengers, to have discovered and repaired it, and the carrier was guilty of gross negligence where its agent had actual knowledge of the presence of the hole and it was not repaired.—*Biggie v. Chicago, B. & Q. R. Co.*, 140 S.W. 602, 159 Mo. App. 350.

**App. 1923.** A railroad owes a passenger the duty of exercising ordinary care to keep station premises in a reasonably safe condition.—*Martin v. Missouri Pac. R. Co.*, 253 S.W. 1083.

**App. 1924.** A carrier owes an intending passenger duty of exercising ordinary care to maintain railroad station platform in a reasonably safe condition.—*Lowther v. St. Louis-San Francisco Ry. Co.*, 261 S.W. 702, 214 Mo. App. 293.

**App. 1927.** Only ordinary care is required of carrier in maintaining station platform and other premises to which intending passengers resort.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

⊕ 286 (2). Open space between platform and cars.

*See explanation, page iii.*

⊕ 286 (3). Duty to protect passengers from crowds.

*See explanation, page iii.*

⊕ 286 (4). Duty with regard to means of entrance to and exit from premises.

**Sup. 1918.** Where a railroad constructed crossing continuing street at south end of station up to and past station platform, held that it was bound to maintain such approach in a reasonably safe condition, although it had provided and was maintaining an approach at the north end of the platform.—*Gurtman v. Lusk*, 208 S.W. 61.

**Sup. 1921.** Notwithstanding the high standard of care required of a carrier as to passengers during the course of their transportation and when entering or leaving the vehicle, the carrier is under no greater duty to maintain its station building than is the owner of buildings used for ordinary business purposes, and so a railroad company owes only duty of ordinary care to maintain steps in station, giving access to trains in a reasonably safe condition.—*Williams v. Kansas City Terminal Ry. Co.*, 231 S.W. 954, 288 Mo. 11, transferred from Court of Appeals 223 S.W. 132.

Where a defendant equipped steps in a station giving access to trains with safety tread, which was supposed to afford a firm footing even though wet, a passenger, who slipped on a step which had become wet presumably from the wet or muddy shoes and dripping umbrellas of the preceding passengers, cannot recover from defendant; it having exercised ordinary care.—*Id.*

**Sup. 1923.** It is the duty of a railroad to properly light its station platform during arrival or departure of passenger trains, and to exercise proper care to furnish safe ingress and egress to passengers.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1909.** A carrier is not an insurer of the safety of its premises; but where it invites public patronage, and maintains a station as a place for transacting business, it must exercise reasonable care to keep the station house, platforms, and approaches thereto in safe condition. Its liability in this respect is the same as that of any person to another who has by invitation or inducement come upon his premises to transact business, and a person so coming has no implied invitation to deviate from passage ways which the premises

es themselves show were prepared by the owner for that special use, and were intended to mark out the only way by which the place of business might be approached.—*Chase v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 1141, 134 Mo. App. 655.

⚡286 (5). **Permitting obstructions on platform.**

**Sup. 1893.** Where mail bags are customarily thrown from the cars upon a certain platform over which passengers are expected to pass, it is the duty of the railroad company to guard against accidents caused by passengers stumbling over such bags in the dark, even though the bags are thrown out by postal clerks in the service of the post-office department.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

**App. 1919.** Where passenger, after leaving train and while on platform helped a brakeman to lift a heavy barrel, railroad was not liable for injuries received while so doing, on ground that passageway on platform was obstructed, where another brakeman and conductor were near by to render help if needed, and it would have been but a short time until obstructions were removed.—*Shaffer v. St. Louis & S. F. Ry. Co.*, 208 S.W. 145, 201 Mo. App. 107.

⚡286 (6). **Permitting ice and snow to accumulate on premises.**

*See explanation, page iii.*

⚡286 (7). **Duty to keep premises lighted.**

**Sup. 1893.** It is the duty of a railway company to furnish lights at its station platforms during the arrival and departure of trains in the nighttime sufficient to guide the steps of passengers using ordinary care.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

**Sup. 1923.** It is the duty of a railroad to properly light its station platform during arrival or departure of passenger trains.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1894.** It is the duty of a railroad company to keep its passenger platforms properly lighted where it is known by its agents or servants that baggage, freight, and express matter is likely to be lodged on such platform, and that unless the platform is lighted persons coming to take passage on trains would probably stumble and fall over such obstacles.—*Waller v. Missouri, K. & T. Ry. Co.*, 59 Mo. App. 410.

**App. 1904.** Plaintiff, a passenger on defendant's railroad, arrived at his destination

on a special train on a dark night, and, following other passengers, who struck matches to aid them in seeing the way to the street, he passed along the platform, which was unlighted, and unguarded by a railing, and fell off the side thereof, with a companion, and was hurt. *Held*, that defendant was liable.—*Gerhart v. Wabash R. Co.*, 84 S.W. 100, 110 Mo. App. 105.

⚡286 (8). **Duty to heat depot.**

*See explanation, page iii.*

⚡286 (9). **Persons entering or leaving car or premises at unaccustomed time or place.**

**App. 1895.** A railroad company was not liable for injuries to one accompanying stock caused by his falling into a culvert while the train was standing at an intermediate station on a dark night.—*Nurse v. St. Louis & S. F. Ry. Co.*, 61 Mo. App. 67.

**App. 1905.** A car, having been engaged by certain excursionists for a round trip was set on a switch at destination, about 250 feet west of the station. An unobstructed, level cinder walk, 25 feet wide, led from the station to the car; but when plaintiff, with others, arrived at the car, in order not to wait for those ahead of her to get aboard, she concluded to enter from the opposite side, and, in attempting to cross over the track for that purpose, caught her foot in a defective switch frog, and fell. *Held*, that defendant was not negligent, though the frog in the switch was defective, and plaintiff be regarded as a licensee.—*Archer v. Union Pac. R. Co.*, 85 S.W. 934, 110 Mo. App. 349.

⚡287. **Taking up passengers.**

Contributory negligence of person injured, see post, ⚡328.

Instructions, see post, ⚡321.

Presumptions and burden of proof, see post, ⚡316.

Questions for jury, see post, ⚡320.

⚡287 (1). **In general.**

**Sup. 1903.** A carrier by elevator must allow reasonable time for passengers to enter and leave the car with safety in the exercise of ordinary care.—*Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246.

**Sup. 1909.** Where one exercising reasonable care was injured while boarding street car by its sudden starting, and servants in charge did not exercise highest practical degree of care, company was liable.—*Wellman*

v. Metropolitan St. Ry. Co., 118 S.W. 31. See Carriers, 298(1) in this Digest.

**Sup. 1917.** It is a general rule that there is no cause of action against carrier in favor of one injured as result of boarding moving car, where no negligence is shown except that car was moving.—*Gunn v. United Rys. Co. of St. Louis*, 193 S.W. 814, 270 Mo. 517, L. R. A. 1917D, 1131.

If one desiring to board moving car is laboring under mental excitement great enough to incapacitate him from judging danger, and carrier knew, or should have known this, failure to stop car is negligence.—*Id.*

One desiring to board moving car may refrain from doing so and sue for inconvenience and loss of time, but if injured in attempting to get on, some negligence other than mere failure to stop car is necessary for recovery.—*Id.*

**Sup. 1927.** Running street car at rate in excess of speed ordinance held negligence per se, irrespective of prospective passenger's knowledge of ordinance.—*Unterlachner v. Wells*, 296 S.W. 755, 317 Mo. 181.

**App. 1900.** A street railway company has the right to make reasonable rules and regulations for the running of its cars, and has the right to fix the stopping places for the reception and discharge of passengers.—*Lesser v. St. Louis & S. Ry. Co.*, 85 Mo. App.

**App. 1904.** The employés in charge of a street car are not chargeable with the duty of preventing a person from negligently attempting to board the car while moving.—*Leu v. St. Louis Transit Co.*, 80 S.W. 273, 106 Mo. App. 329.

**App. 1904.** An instruction that if plaintiff, at a place where defendant received passengers, signaled the motorman his intention to become a passenger, and the motorman slowed the car down to enable plaintiff to board it, and plaintiff, while it was so slowed down, attempted to board it, it was the duty of the motorman to use a high degree of care to so control the car as to enable plaintiff to safely get on it as a passenger, correctly states the law.—*Eikenberry v. St. Louis Transit Co.*, 80 S.W. 380, 103 Mo. App. 442.

**App. 1905.** A street railway company is required to exercise toward passengers the utmost care and diligence of very cautious persons while such passengers are boarding and alighting from its cars.—*Lehner v. Met-*

*ropolitan St. Ry. Co.*, 85 S.W. 110, 110 Mo. App. 215.

**App. 1911.** A person attempted to board a slowly moving street car just starting up a viaduct. He succeeded in placing one foot on the lower step, but was unable to pull himself up, and he collided with a rod of a sign on the viaduct warning trespassers. The conductor quickly discovered his peril and tried to assist him to board the car, but without success. *Held*, that the conductor was as a matter of law not negligent for failing to signal the car to stop, instead of attempting to assist such person to board the car.—*Mathews v. Metropolitan St. Ry. Co.*, 137 S.W. 1003, 156 Mo. App. 715.

**App. 1911.** In furnishing its passengers a reasonably safe and convenient place at which to alight from or enter its cars, a railroad company is not bound to stop its passenger coaches at any particular part of the station platform, or at the platform at all, provided the place where they are stopped be reasonably safe and convenient.—*Le Duc v. St. Louis, I. M. & S. Ry. Co.*, 140 S.W. 758, 150 Mo. App. 136.

The duty of a railroad company to furnish its passengers a reasonably safe place to alight from or enter its cars is not changed because the train is a mixed one, carrying both passengers and freight.—*Id.*

Where a mixed train was stopped, so that the passenger coaches were some distance from the station, freight being unloaded and empties switched, and it was the custom of the road to either stop the train, in the first instance, so that the passenger coaches would be near the station, or, if they were away from the station, to move them down, and then give the passengers an opportunity to enter the cars, it was negligence to leave the station without again stopping the passenger coaches; and the railroad company was liable for injuries received by a passenger who, relying on the custom, waited at the station for the passenger coaches to stop, and attempted to board the moving train when he saw there would be no stop.—*Id.*

In the above case, the unloading of freight and switching of cars was not notice to the passenger that he was expected to board the train at an unusual place.—*Id.*

**App. 1917.** The motorman of a pay as you enter car held, as regards liability of carrier for injury to passenger by starting of car while she was attempting to enter by open

es themselves show were prepared by the owner for that special use, and were intended to mark out the only way by which the place of business might be approached.—*Chase v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 1141, 134 Mo. App. 655.

286 (5). Permitting obstructions on platform.

**Sup. 1893.** Where mail bags are customarily thrown from the cars upon a certain platform over which passengers are expected to pass, it is the duty of the railroad company to guard against accidents caused by passengers stumbling over such bags in the dark, even though the bags are thrown out by postal clerks in the service of the post-office department.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

**App. 1919.** Where passenger, after leaving train and while on platform helped a brakeman to lift a heavy barrel, railroad was not liable for injuries received while so doing, on ground that passageway on platform was obstructed, where another brakeman and conductor were near by to render help if needed, and it would have been but a short time until obstructions were removed.—*Shaffer v. St. Louis & S. F. Ry. Co.*, 208 S.W. 145, 201 Mo. App. 107.

286 (6). Permitting ice and snow to accumulate on premises.

See explanation, page iii.

286 (7). Duty to keep premises lighted.

**Sup. 1893.** It is the duty of a railway company to furnish lights at its station platforms during the arrival and departure of trains in the nighttime sufficient to guide the steps of passengers using ordinary care.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

**Sup. 1923.** It is the duty of a railroad to properly light its station platform during arrival or departure of passenger trains.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1894.** It is the duty of a railroad company to keep its passenger platforms properly lighted where it is known by its agents or servants that baggage, freight, and express matter is likely to be lodged on such platform, and that unless the platform is lighted persons coming to take passage on trains would probably stumble and fall over such obstacles.—*Waller v. Missouri, K. & T. Ry. Co.*, 59 Mo. App. 410.

**App. 1904.** Plaintiff, a passenger on defendant's railroad, arrived at his destination

on a special train on a dark night, and, following other passengers, who struck matches to aid them in seeing the way to the street, he passed along the platform, which was unlighted, and unguarded by a railing, and fell off the side thereof, with a companion, and was hurt. *Held*, that defendant was liable.—*Gerhart v. Wabash R. Co.*, 84 S.W. 100, 110 Mo. App. 105.

286 (8). Duty to heat depot.

See explanation, page iii.

286 (9). Persons entering or leaving car or premises at unaccustomed time or place.

**App. 1895.** A railroad company was not liable for injuries to one accompanying stock caused by his falling into a culvert while the train was standing at an intermediate station on a dark night.—*Nurse v. St. Louis & S. F. Ry. Co.*, 61 Mo. App. 67.

**App. 1905.** A car, having been engaged by certain excursionists for a round trip was set on a switch at destination, about 250 feet west of the station. An unobstructed, level cinder walk, 25 feet wide, led from the station to the car; but when plaintiff, with others, arrived at the car, in order not to wait for those ahead of her to get aboard, she concluded to enter from the opposite side, and, in attempting to cross over the track for that purpose, caught her foot in a defective switch frog, and fell. *Held*, that defendant was not negligent, though the frog in the switch was defective, and plaintiff be regarded as a licensee.—*Archer v. Union Pac. R. Co.*, 85 S.W. 934, 110 Mo. App. 349.

287. Taking up passengers.

Contributory negligence of person injured, see post, 328.

Instructions, see post, 321.

Presumptions and burden of proof, see post, 316.

Questions for jury, see post, 320.

287 (1). In general.

**Sup. 1903.** A carrier by elevator must allow reasonable time for passengers to enter and leave the car with safety in the exercise of ordinary care.—*Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246.

**Sup. 1909.** Where one exercising reasonable care was injured while boarding street car by its sudden starting, and servants in charge did not exercise highest practical degree of care, company was liable.—*Wellman*

v. Metropolitan St. Ry. Co., 118 S.W. 31. See Carriers, ←208(1) in this Digest.

**Sup. 1917.** It is a general rule that there is no cause of action against carrier in favor of one injured as result of boarding moving car, where no negligence is shown except that car was moving.—*Gunn v. United Rys. Co. of St. Louis*, 193 S.W. 814, 270 Mo. 517, L. R. A. 1917D, 1131.

If one desiring to board moving car is laboring under mental excitement great enough to incapacitate him from judging danger, and carrier knew, or should have known this, failure to stop car is negligence.—*Id.*

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**Sup. 1927.** Running street car at rate in excess of speed ordinance *held* negligence per se, irrespective of prospective passenger's knowledge of ordinance.—*Unterlachner v. Wells*, 296 S.W. 755, 317 Mo. 181.

**App. 1900.** A street railway company has the right to make reasonable rules and regulations for the running of its cars, and has the right to fix the stopping places for the reception and discharge of passengers.—*Lesser v. St. Louis & S. Ry. Co.*, 85 Mo. App.

**App. 1904.** The employés in charge of a street car are not chargeable with the duty of preventing a person from negligently attempting to board the car while moving.—*Leu v. St. Louis Transit Co.*, 80 S.W. 273, 106 Mo. App. 329.

**App. 1904.** An instruction that if plaintiff, at a place where defendant received passengers, signaled the motorman his intention to become a passenger, and the motorman slowed the car down to enable plaintiff to board it, and plaintiff, while it was so slowed down, attempted to board it, it was the duty of the motorman to use a high degree of care to so control the car as to enable plaintiff to safely get on it as a passenger, correctly states the law.—*Eikenberry v. St. Louis Transit Co.*, 80 S.W. 360, 103 Mo. App. 442.

**App. 1905.** A street railway company is required to exercise toward passengers the utmost care and diligence of very cautious persons while such passengers are boarding and alighting from its cars.—*Lehner v. Met-*

ropolitan St. Ry. Co., 85 S.W. 110, 110 Mo. App. 215.

**App. 1911.** A person attempted to board a slowly moving street car just starting up a viaduct. He succeeded in placing one foot on the lower step, but was unable to pull himself up, and he collided with a rod of a sign on the viaduct warning trespassers. The conductor quickly discovered his peril and tried to assist him to board the car, but without success. *Held*, that the conductor was as a matter of law not negligent for failing to signal the car to stop, instead of attempting to assist such person to board the car.—*Mathews v. Metropolitan St. Ry. Co.*, 137 S.W. 1003, 156 Mo. App. 715.

**App. 1911.** In furnishing its passengers a reasonably safe and convenient place at which to alight from or enter its cars, a railroad company is not bound to stop its passenger coaches at any particular part of the station platform, or at the platform at all, provided the place where they are stopped be reasonably safe and convenient.—*Le Duc v. St. Louis, I. M. & S. Ry. Co.*, 140 S.W. 758, 159 Mo. App. 136.

The duty of a railroad company to furnish its passengers a reasonably safe place to alight from or enter its cars is not changed because the train is a mixed one, carrying both passengers and freight.—*Id.*

Where a mixed train was stopped, so that the passenger coaches were some distance from the station, freight being unloaded and empties switched, and it was the custom of the road to either stop the train, in the first instance, so that the passenger coaches would be near the station, or, if they were away from the station, to move them down, and then give the passengers an opportunity to enter the cars, it was negligence to leave the station without again stopping the passenger coaches; and the railroad company was liable for injuries received by a passenger who, relying on the custom, waited at the station for the passenger coaches to stop, and attempted to board the moving train when he saw there would be no stop.—*Id.*

In the above case, the unloading of freight and switching of cars was not notice to the passenger that he was expected to board the train at an unusual place.—*Id.*

**App. 1917.** The motorman of a pay as you enter car *held*, as regards liability of carrier for injury to passenger by starting of car while she was attempting to enter by open

front door, under duty to see that no one was attempting to board the car by such door.—*Lynch v. United Rys. Co. of St. Louis*, 193 S. W. 890, 197 Mo. App. 238.

**App. 1920.** If, while the street car company's invitation to board its car was still open, plaintiff accepted it and was in the act of entering, having hold of the handralls with one foot on the step and the other entering the door, plaintiff was entitled to a reasonable time to enter, and the car operatives must see that no one is in the act of boarding the car when they start or shut the door, and they must use the high degree of care owed a passenger in ascertaining this fact, and the liability of the company was not restricted to a case of actual knowledge of the operatives that plaintiff was boarding the car.—*Vogts v. Kansas City Rys. Co.*, 228 S.W. 526.

**App. 1923.** A street car conductor was charged with duty of seeing those waiting to board car, which had stopped for passengers, as well as affording them reasonable opportunity to safely board it.—*Detchemendy v. Wells*, 253 S.W. 150.

287 (2). Management of other cars or trains.

**Sup. 1921.** The engineer of a through train running late on the time of an accommodation train at great speed, when he saw persons at a suburban station attempting to cross the track, could assume that they saw his train and the speed of such train, and that, if waiting passengers, they knew the local train had not arrived on time, and that they would stop and look before entering on the track, which was the real danger zone.—*State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds*, 233 S.W. 219, 289 Mo. 479, quashing judgment and opinion (App.) *Martin v. St. Louis-San Francisco Ry. Co.*, 227 S.W. 129.

**App. 1909.** Carrier admitting passengers on rear coach of train while coaches are being coupled thereto fails to exercise high care imposed when coaches are shoved against train with dangerous violence.—*Wise v. Wabash R. Co.*, 115 S.W. 452. See Carriers, 298(1) in this Digest.

**App. 1878.** Negligence of passenger in boarding street car. See *Schreiner v. St. Louis R. Co.*, 5 Mo. App. 596, memorandum.

**App. 1920.** Where headlight of suburban car was out of order, it was car employes' duty, in operating car during the night, to exercise great care in approaching station grounds, where persons would likely

be for the purpose of becoming passengers.—*Willi v. United Rys. Co. of St. Louis*, 224 S. W. 86, 205 Mo. App. 272.

**App. 1921.** In an action for death when plaintiff's deceased and others were crossing a track to a station platform, the case was not one where the engineer had the right to assume that such persons who were sui juris would not step from a place of safety into one of peril or would step off of the track out of danger, where he admitted that he knew the group of passengers were going to cross in front of his train.—*Martin v. St. Louis-San Francisco Ry. Co.*, 227 S.W. 129, judgment and opinion quashed (Sup.) *State ex rel. St. Louis-San Francisco Ry. v. Reynolds*, 233 S.W. 219.

Where a railroad engineer saw a group of passengers leaving a station for the purpose of crossing the track to take what they supposed was the local accommodation train which he knew was following his train, such passengers were, from the time that he knew that they were going to cross the track, in the danger zone, and the duty then devolved upon him to do everything he could reasonably do to either stop or slow up his train so as to prevent running down some of them, and the humanitarian doctrine applied.—*Id.*

287 (3). Duty to instruct or warn passenger.

**Sup. 1920.** Train employes are not required, after train has waited a reasonable time to discharge and receive passengers, to give notice that train is about to start to persons on station platform with nothing to indicate they intend to become passengers, but are required to give notice before causing train to move if they see a person in the act of boarding the train, or preparing to do so, or if in the exercise of reasonable diligence there is reason to believe some one is about to get aboard.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

Trainmen are not required to warn a person standing on station platform that train is about to start unless they know, or have reason to believe, that such person will attempt to board the train.—*Id.*

**App. 1902.** Where a street car stops at a street corner in response to the signal of a person desiring to board it, the street car company is liable for injuries to such person caused by the sudden starting of the car while he is boarding it, though the car stopped for the purpose of discharging, and not receiving,

passengers, if such person is not warned by the conductor not to board the car.—*Maxey v. Metropolitan St. Ry. Co.*, 68 S.W. 1063, 95 Mo. App. 303.

287 (4). **Duty to assist passenger in boarding car.**

**Sup. 1892.** Where access to a train at a station is easy, it is not the duty of the carrier's employes to assist a passenger in getting on board.—*Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 21 S.W. 1, 113 Mo. 570, 18 L. R. A. 599.

**App. 1902.** A carrier of passengers must exercise the highest degree of care of a prudent person in view of the circumstances, and this duty extends to assisting passengers in getting on and off cars.—*Young v. Missouri Pac. Rly. Co.*, 93 Mo. App. 267.

287 (5). **Starting car prematurely or allowing passenger insufficient time to board car.**

**Sup. 1882.** In an action against a railroad company for damages received by plaintiff in attempting to board a passenger train, plaintiff claiming that those in charge of the train negligently failed to stop it a reasonable length of time to permit plaintiff to get on, the court instructed that it was the duty of those in charge of the train to bring it to a full stop and to stop a reasonable length of time to allow passengers to get off and on, and that if they did not do so and started up at an unusual rate of speed or with unusual suddenness, whereby plaintiff was injured, the verdict should be in her favor. *Held*, that there was no error in the instruction.—*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475.

**Sup. 1884.** In the operation of a street car it is the duty of the carrier to allow its passengers reasonable time to enter and leave its cars with safety, and it should allow its passengers reasonable time to obtain a seat or to seize the straps furnished for passengers when standing before the car is started, and if it does start its car before a passenger has time to take a seat or secure his hold on a strap, it must not do so with such violence as to upset him.—*Dougherty v. Missouri Pac. R. Co.*, 81 Mo. 325, 51 Am. Rep. 239, affirming *Same v. Missouri Pac. R. Co.* (1881) 9 Mo. App. 478.

**Sup. 1893.** A carrier need not wait for a passenger to reach her seat before starting the train, unless there is some special reason, as in case of a person outside of a coach, and in case of such exception the carrier must have notice thereof.—*Yarnell v. Kansas City,*

*Ft. S. & M. R. Co.*, 21 S.W. 1, 113 Mo. 570, 18 L. R. A. 599.

**Sup. 1912.** If street car conductor should have realized that sudden starting would throw down and injure corpulent lady of 57 who was entering car, railroad company was liable.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91. See Carriers, 281 in this Digest.

**Sup. 1920.** Trainmen causing train to start when they knew, or should have known, that a passenger is in the act of boarding the train, are negligent even though they have warned passenger before giving the engineer the signal to start the train.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**App. 1891.** It is the absolute duty of those in charge of a street car to discover every one in the act of getting on the car before it starts, and this duty is the same, regardless of the density or sparseness of the population of the city at the place of the occurrence; but they are not bound to so discover persons who attempt to board the car after it has started, although if they do see such persons, they must exercise such prudence in the management of the car as the exigencies of the situation demand.—*Meriwether v. Kansas City Cable Ry. Co.*, 45 Mo. App. 528.

**App. 1903.** A street car should be brought to a full stop at a crossing when signaled, and should be kept stationary for a time reasonably sufficient to permit a passenger to reach some place of safety on the car.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

**App. 1905.** It is the duty of the servants of a railroad in charge of a train to stop it a reasonable time to allow an intending passenger to board with safety.—*Lehner v. Metropolitan St. Ry. Co.*, 85 S.W. 110, 110 Mo. App. 215.

**App. 1904.** Where a street car has stopped for the purpose of receiving passengers, it is the conductor's duty to hold the car a reasonable length of time to allow all passengers to board the car and reach a place of safety thereon before giving the signal to start, regardless of the question by whom the signal to stop was given.—*Stoddard v. St. Louis & M. R. R. Co.*, 80 S.W. 33, 105 Mo. App. 512.

**App. 1904.** A street car company is bound to stop a car for a period reasonably sufficient to afford passengers an opportunity



to board it, in the exercise of reasonable diligence on their part, with due regard to age and physical infirmity.—*Shanahan v. St. Louis Transit Co.*, 83 S.W. 783, 109 Mo. App. 228.

Where plaintiff was injured by the premature starting of a street car while attempting to board it, an instruction that if the jury found that, after seeing plaintiff's dangerous position, the conductor could have stopped the car, by signalling to the motorman, in time to have prevented the injury, and failed to exercise ordinary care so to do, which produced it, plaintiff was entitled to recover, etc., was proper.—*Id.*

**App. 1906.** Where other persons had boarded a street car before the plaintiff, and she attempted to board it while it was still standing, the conductor's failure to see her, and his act in starting the car while she was attempting to board it, was negligence.—*Kohr v. Metropolitan St. Ry. Co.*, 92 S.W. 1145, 117 Mo. App. 302.

**App. 1907.** Where an open car with a footboard along each side of it for use of passengers in boarding it stopped at a regular stopping place for the reception of passengers, it was the duty of the conductor, before giving a signal to start, to look to see that no one was in a position to be injured should the same be started, and he had no right to assume from the fact that the car had been stationary a time reasonably sufficient to transact the business at that point that no one would be endangered by starting it.—*Miller v. Metropolitan St. Ry. Co.*, 102 S.W. 592, 125 Mo. App. 414.

Operators of a street car in the discharge of their duty to a person boarding it to become a passenger should either hold it at rest until the passenger has been given a reasonable time in which to seat himself, or, where there is no vacant seat, to reach a place where he may support himself while standing, or, if they start the car before the passenger has reached a place of safety, the start must be gradual to avoid the danger of throwing him down.—*Id.*

**App. 1910.** A street car must stop a sufficient length of time to give passengers an opportunity to board it and reach a place of safety, and, where under the circumstances it is necessary for a passenger to reach a seat and be seated in order to be safe from danger when the car is to start, the car must stop until the passenger has been seated.—*Brady*

*v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1910.** A carrier must allow reasonable time for passengers to enter its cars with safety in the exercise of ordinary care.—*Johnson v. St. Joseph Ry.*, 148 Mo. App. 376.

**App. 1912.** A street car company, whose vehicle is started before incoming passengers have seated themselves, is liable if it is started so violently that they are injured.—*Gabriel v. Metropolitan St. Ry. Co.*, 148 S.W. 168. See Carriers, 298(1) in this Digest.

**App. 1913.** In absence of notice prior to the signal to start the car, street car employes need not anticipate that parties at or near a stopping place intend to become passengers.—*Fields v. Metropolitan St. Ry. Co.*, 155 S.W. 845, 169 Mo. App. 624.

A street car company need only hold its car stationary for a reasonable time for a passenger to board and obtain a position of safety, not being required to wait an unreasonable time for a dilatory passenger.—*Id.*

Street car employes must take notice of the position of one who is attempting to board and is in such a position that the sudden starting of the car would endanger him.—*Id.*

**App. 1916.** A railroad company is required to stop its freight and mixed trains carrying passengers at stations a sufficient length of time to permit passengers to enter and leave, and a failure to do so is negligence.—*Witham v. Lusk*, 190 S.W. 403.

**App. 1917.** Street railroad is not liable for injury to one boarding car from sudden starting, unless such person was boarding at usual place, or unless those in charge of car knew, before starting it, that such person was boarding it and had not reached a place of reasonable safety.—*Husbands v. St. Louis Electric Terminal Ry. Co.*, 196 S.W. 78.

**App. 1919.** If a street car was allowed to stand at a point to receive passengers, and a number of persons, including plaintiff, were entering, it was the duty of those in charge of the car to ascertain that all such persons were in a place of safety before starting the car.—*Elliott v. United Rys. Co. of St. Louis*, 214 S.W. 234, 201 Mo. App. 662.

**App. 1919.** In an action against a street railway company for personal injuries resulting from starting a car while plaintiff was

boarding it, it was immaterial whether the stop was long or short, where the invitation to enter had not been closed, and such starting was an act of negligence.—*Baldwin v. Kansas City Rys. Co.*, 214 S.W. 274.

**App. 1921.** A street car should not be started merely because a sufficient length of time has elapsed to permit a passenger and those in front of her to board the car safely, for, however long a stop may be, due care requires that a conductor should look to his car before signaling to start.—*Baldwin v. Kansas City Rys. Co.*, 231 S.W. 280.

**App. 1924.** Where defendant street railway company's car, in response to decedent's signal, was slowed down until it had come almost to a dead stop with the doors open and the steps lowered at the precise place where defendant was accustomed to receive and discharge passengers, whereupon decedent attempted to board a car by placing one foot upon the lower step and by reaching for the handrail, but while so doing, and before he had obtained hold on the handrail, the car went forward with a sudden jerk, and proceeded on its way, throwing decedent from the step and dragging him to his death, *held*, that defendant was guilty of actionable negligence.—*Kern v. United Rys. Co. of St. Louis*, 259 S.W. 821, 214 Mo. App. 232.

☞287 (6). **Duty as to persons attempting to board car at improper time and place.**

**App. 1902.** Plaintiff alleged negligence, in that the servants of defendant street railway negligently started a car as plaintiff was boarding it. Defendant claimed that the car was stopped only to discharge passengers. *Held*, that defendant was not liable if the car was not stopped to allow plaintiff to board it, and the conductor warned plaintiff not to do so, in a tone of voice sufficiently loud to be heard by an ordinary person, though plaintiff did not in fact hear.—*Maxey v. Metropolitan St. Ry. Co.*, 68 S.W. 1063, 95 Mo. App. 303.

**App. 1904.** Car men are not under obligation to guard against negligently starting the car so as to throw a person who attempts to board it on the wrong side of a street crossing, where the car has stopped to throw a switch, where they have no actual knowledge of his position, and the only testimony to show that it was usual to receive passengers at that point is that of the injured person, who merely states that he had previously seen persons board the car where he did.—*McCarty v. St. Louis & S. Ry. Co.*, 80 S.W. 7, 105 Mo. App. 596.

**App. 1905.** A motorman who, on account of the crowded condition of the rear platform of his car, invites an intending passenger to enter by the front platform, is bound to exercise that high degree of care required of a carrier to prevent injury to such passenger while boarding the car.—*Thompson v. St. Louis & S. Ry. Co.*, 86 S.W. 465, 111 Mo. App. 465.

**App. 1906.** An instruction in an action against the street railroad company for injuries to a passenger attempting to board a car while in motion, declaring that if the passenger got on the car after it had started she was not entitled to recover, was properly modified by adding unless the jury found that the conductor in charge of the car saw the passenger hanging to the car and failed to exercise ordinary care to stop it and thereby avoid injury to her.—*Foland v. Southwestern Missouri Electric Ry. Co.*, 95 S.W. 958, 119 Mo. App. 284.

An instruction in an action against a street railway company for injuries to a passenger while attempting to board a car, requiring the passenger to prove in order to recover that she attempted to board the car while it was at a standstill, and that the employees suddenly started it before she had time to get on board, was properly modified by adding, unless the jury found that the conductor in charge of the car saw the passenger hanging to the car after it had started, and failed to exercise ordinary care to stop the car, and thereby prevent injury to the passenger.—*Id.*

**App. 1914.** For a motorman of a street car to suddenly accelerate its speed after leaving an elevated station is not negligence as to one who attempted to board the car while in motion and while the gates were being closed, unless the motorman knew, or had reason to believe, that a passenger had attempted to board the car.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

☞287 (7). **Slowing up to receive passenger and then suddenly increasing speed.**

**App. 1903.** Where a street car slowed down at the usual point for receiving passengers, so that plaintiff had reason to believe it was for that purpose on this occasion, the company is liable for the consequences of any mistake on his part in so believing, if he was not guilty of contributory negligence.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

**App. 1916.** Motorman who had reduced speed before reaching stopping place, and saw persons attempting to board car, *held* bound to see that they had an opportunity to do so in safety.—*Goebel v. United Rys. Co. of St. Louis*, 181 S.W. 1051.

287 (8). Taking up passengers who have temporarily left train.

See explanation, page iii.

287 (9). Effect of statute or ordinance regulating movements of vehicles.

**App. 1903.** Where a city ordinance requires street cars to stop at crossings, a rule of the company as to the cars stopping for passengers when they are eight minutes late was inadmissible, in an action for injuries in attempting to board a car, from its sudden starting.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

288. Sufficiency and safety of means of transportation.

Instructions, see post, 321.

Presumptions and burden of proof, see post, 316.

**App. 1879.** Where the paddle wheel of a vessel breaks, and a passenger is injured, a rebuttable presumption of negligence arises.—*Yerkes v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 265.

**App. 1927.** In maintaining means and instrumentalities of transportation, carrier owes passengers duty of exercising highest degree of care.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

289. — Horses and vehicles.

See explanation, page iii.

290. — Railroad locomotives and cars.

Contributory negligence, see post, 337.

290 (1). In general.

**Sup. 1895.** In an action against a railroad company for injury caused by the negligence of defendant in not providing "suitable steps for plaintiff's exit from a car," an instruction that, if the defendant provided such platform steps as "were ordinarily provided for similar cars," then it had satisfied the law, without regard to whether they were safe, is error.—*Dougherty v. Kansas City & I. Rapid-Transit Ry.*, 30 S.W. 317, 128 Mo. 33, 49 Am. St. Rep. 530.

**Sup. 1908.** It is a carrier's duty to provide safe and convenient means of ingress

and egress in and out of its trains for its passengers.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

Carriers should anticipate that women, the feeble as well as the strong and robust, will seek passage, and provide suitable platforms and steps for their convenience and assistance.—*Id.*

**Sup. 1925.** May be liable for injury caused by icy steps.—*Taylor v. Missouri Pac. R. Co.*, 279 S.W. 115, 311 Mo. 604.

Carrier has duty of highest degree of care until passenger has alighted, and this applies to steps for descent.—*Id.*

**App. 1902.** A railroad company is not required to furnish portable steps for the use of its passengers in entering or leaving its cars.—*Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**App. 1904.** In an action by a passenger for injuries occasioned by a collision between the cars of a train after the parting of a coupling, defendant's instruction that if its cars were equipped with automatic couplers and air brakes in good order, and that no defects could be discovered in either by careful examination, and that cars of the kind in question did become uncoupled when handled as these cars were, and "that these cars became uncoupled without apparent cause or discoverable defect," then defendant would not be liable, is improperly refused.—*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

**App. 1906.** Where a railroad company provides its passenger cars with vestibule doors, it is not only answerable for the negligent acts of its servants in opening such doors and permitting them to remain so, but is also responsible for its failure to exercise a high degree of care, to the end that such doors shall be closed and the vestibule rendered reasonably safe, though the doors were opened by others than its servants.—*Wagoner v. Wabash R. Co.*, 94 S.W. 293, 118 Mo. App. 239.

Where a carrier provided vestibules for its passenger cars, it thereby impliedly invited its passengers to pass to and fro to such portions of the train as they were entitled to occupy according to the grade of their transportation, and was thereby bound to maintain such vestibules in a reasonably safe condition.—*Id.*

**App. 1906.** Where there was such negligent delay in the transportation of a freight train that one who had taken passage thereon for a distance of 6 miles was obliged to pass the night in a car, whereby he sustained injuries from exposure to cold, the carrier was liable for such injuries.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

**App. 1908.** Where a passenger was injured by falling from the icy platform and steps of a railroad car, the carrier was not chargeable with negligence merely because vestibuled cars were not provided.—*Haas v. St. Louis & S. F. R. Co.*, 106 S.W. 599, 128 Mo. App. 79.

**App. 1910.** While railroad companies need not provide vestibuled trains for passengers, if they do, they must exercise high care to keep them reasonably safe, and must exercise high care to keep the doors closed and traps on the platform in place while en route, and a passenger, without knowledge to the contrary, may conduct himself as though it had fully performed such duty.—*Johnston v. St. Louis & S. F. R. Co.*, 130 S.W. 413, 150 Mo. App. 304.

**App. 1910.** Where a railroad company had no agent at a station and no means for a passenger to arrange with reference to his baggage before boarding the train, and the passenger was required to go into the coach to make his arrangements after boarding the train, he was not a mere volunteer or licensee in so doing, but the company owed him the duty of seeing that the doors through which he was required to pass were reasonably safe.—*Creason v. St. Louis, I. M. & S. Ry. Co.*, 130 S.W. 415, 149 Mo. App. 223.

Where the door knob of the door to a passenger coach, where a passenger was required to go to arrange with reference to his baggage, was so close to the door casing that when the door was closed a man's finger could not be passed between them, this was sufficient to charge the railroad company with negligence.—*Id.*

That the door of a baggage coach was constructed in the way that doors to such cars are ordinarily constructed does not relieve the railroad company of the charge of negligence, where the method of construction was inherently negligent.—*Id.*

**App. 1912.** A carrier of passengers must keep its cars supplied with such reasonable degree of heat as will keep its passengers, in

ordinary normal condition, in a reasonable degree of comfort.—*Roark v. Missouri Pac. Ry. Co.*, 147 S.W. 499, 163 Mo. App. 705.

**App. 1928.** Railroad is not liable for injuries caused by peelings on car floor, unless employees had knowledge or peelings were there for period imputing knowledge.—*Jones v. St. Louis-San Francisco Ry. Co.*, 5 S.W.(2d) 101.

#### ⇐290 (2). Statutory regulations.

*See explanation, page iii.*

#### ⇐290 (3). Cars of other carriers.

**App. 1915.** A carrier is responsible for the operation of the train to which a Pullman car is attached.—*Siegel v. Illinois Cent. R. Co.*, 172 S.W. 420, 186 Mo. App. 645.

#### ⇐291. — Railroad tracks and roadbeds.

Evidence, see post, ⇐316(1), 317(6), 318(7).  
Pleading, see post, ⇐314(2), 315(1).

**Sup. 1882.** Whether the statute requiring railway companies to construct ditches and drains along the sides of their roadbeds is regarded as intended for the protection of the track of the company or for the protection of the lands of adjacent proprietors or both, it cannot be interpreted to mean that a railway company shall anticipate and make provision for unprecedented floods, where such ditches and drains are required to be constructed.—*Ellet v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 518.

**Sup. 1899.** In an action against a railroad for injury received in a wreck resulting from the bent of a bridge being washed out, the testimony showed that the stream was turbulent and dangerous, subject to sudden floods, which frequently destroyed portions of the bridge, which was an unsafe one, for that locality, and, instead of being built on stone abutments let down to bedrock, or on sills bolted to the solid rock, was built on posts, and, when any of these washed out, bents were rested on ties or blocks placed on the surface. The company knew that a great rise had occurred in the stream the night before, but did not know of a heavy rain later in the night. *Held*, that it was negligent in running its train over the bridge the next morning without inspecting it.—*Cobb v. St. Louis & H. Ry. Co.*, 50 S.W. 894, 149 Mo. 609.

**App. 1910.** A carrier of passengers must look out for and remove such objects along and adjacent to its roadway as may threaten the safety of its passengers, and where

threatening objects, such as decayed trees, stand immediately adjacent to the right of way and are sufficiently menacing to evince probable danger, it must exercise high care as to them, and must remove them when it can do so without becoming a trespasser.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

Rev. St. 1909, § 3049 (Rev. St. 1899, § 1035; Ann. St. 1906, p. 898), authorizing railroads to enter on the lands of any person and cut down standing trees that may be in danger of falling on the tracks, making compensation therefor, imposes a duty on a railroad, subject to the statute as a part of its charter, and the railroad must look out for and remove menacing trees standing adjacent to the right of way, and, for its failure so to do, it must respond in damages for breach of duty.—*Id.*

**App. 1927.** Railroad owed prospective passenger, injured by block thrown up by train, duty of exercising highest degree of care in maintaining track and switches.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

292. — Street railroads.

Admissibility of evidence, see post, 317 (4).

292 (1). In general.

**Sup. 1892.** It is the duty of a cable-railway company, in supplying grips and brakes, and in keeping them in repair, to anticipate all such weather and conditions of track as might reasonably be expected in such a climate.—*Sharp v. Kansas City Cable Ry. Co.*, 20 S.W. 93, 114 Mo. 94.

**App. 1894.** In an action for injuries caused by plaintiff's dress catching on a threaded bolt on the platform of defendant's street car, causing her to fall on the ground, where there was no direct evidence that the bolt was an unusual appliance or dangerous, the evidence was not insufficient; the gravamen of the complaint being that the bolt extended three-eighths of an inch above the tap, and no direct evidence was necessary to prove that a bolt in that condition is likely to produce such accidents.—*Chartrand v. Southern Ry. Co.*, 57 Mo. App. 425.

**App. 1900.** Where a passenger is injured by being struck by a brake handle, the brake being held by a "dog" working on a ratchet wheel which was loosened in some way, allowing the handle to swing around and hit plaintiff, who was on the platform, the fact

that the injury would have been prevented if the brakeman had held the brake with his hand does not show conclusively a liability of the carrier for the injury, as a carrier is not obliged to take precautions against casualties which were never known to occur before and which may not reasonably be expected.—*Holt v. Southwest Missouri Electric Ry. Co.*, 84 Mo. App. 443.

**App. 1906.** Where the elbow of a street car passenger was struck and injured by a passing car, it appearing that the space between defendant's double tracks at the point in question was so narrow that the cars would rub or bump together in passing, and plaintiff's evidence showed that they did so, it would be presumed that the tracks were negligently constructed and maintained, authorizing the jury to find defendant guilty of negligence in operating cars over such tracks.—*Smith v. St. Louis Transit Co.*, 97 S.W. 218, 120 Mo. App. 328.

**App. 1911.** Where it is shown in an action against a carrier for personal injuries that a pole or trolley broke in consequence of its weakened condition, it devolves upon the defendant to show the exercise of the highest practical degree of care.—*Donovan v. Kansas City Elevated Ry. Co.*, 138 S.W. 679, 157 Mo. App. 649.

**App. 1916.** To render a street car company liable for injury to passenger from foreign substance in its car and on the steps, it must appear that its employes knew, or should have known, of the presence of the danger, and that they had a reasonable time thereafter to remove it.—*Tevls v. United Rys. Co. of St. Louis*, 185 S.W. 738.

292 (2). Defects in cars.

**Sup. 1886.** In an action against a street railway company for damages for killing plaintiff's minor child, the defendant is responsible for an injury resulting from the lack of a gate on the front platform of its car, under section 4, Acts 1869 (Laws Mo. 207), providing that "no passenger shall be permitted to get on or off any car by the front platform while the car is in motion, and each car shall be furnished with such adjustable gate or guard as shall prevent it," notwithstanding the provision of Act January 16, 1860, which declares that "said railroads shall not be liable for injuries occasioned to persons by reason of their getting on or off the cars by the front or forward end of the car."—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. 332.

**Sup. 1921.** A street railway could not be held negligent for maintaining a handhold on a street car which contained a defect not discoverable except by breaking the brass casting holding the rail, where the handhold was inspected from time to time by stepping on the step and jerking on it, as far as injuries to one not a passenger was concerned.—*Galloway v. Kansas City Rys. Co.*, 233 S.W. 385.

**App. 1904.** A street car company is under obligation to a person who attempts to board a car at an unusual place without the knowledge of the carmen, to use ordinary care to keep the handrail used by passengers in boarding and alighting in proper repair.—*McCarty v. St. Louis & S. Ry. Co.*, 80 S.W. 7, 105 Mo. App. 596.

**App. 1909.** Where a passenger was thrown from the platform of a street car, before it had stopped at his destination, by a defective board in the platform, which turned his foot, the street car company was liable for the injury.—*Blackwell v. Metropolitan St. Ry. Co.*, 119 S.W. 456, 137 Mo. App. 654.

**App. 1913.** In determining whether a street railroad company was negligent in failing to keep the steps of its car free from ice and frozen slush, the obligation of high care is to be considered in connection with the circumstances of the case, and whether prudent persons would have anticipated the serious results from the freezing of the deposits.—*Craig v. United Rys. Co. of St. Louis*, 158 S.W. 390, 175 Mo. App. 616.

Where the conductor of a street car cleaned the steps before beginning a 14-minutes trip, his failure to clean the steps again before plaintiff alighted will not render the defendant company liable, unless in the exercise of a high degree of care the frozen slush on the steps should have been observed.—*Id.*

**App. 1917.** In freezing weather, and when deposits of snow and ice are known to be, or are likely to be, on the step, those in charge of a street car are required to anticipate that a passenger might slip on the step.—*Bate v. Harvey*, 195 S.W. 571.

#### ☞ 292 (3). Obstructions on or near track.

**Sup. 1893.** Where plaintiff, while riding on the steps of defendant's street car, was knocked off by a derrick standing near the track, the fact that the track had been moved nearer the derrick on the day of the accident tends to show negligence on the part of defendant's driver, as he must have known of its proximity to the cars, and for that reason

should have used care to avoid exposing passengers to danger, and the question as to his negligence is for the jury.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1900.** If a cross-beam on a pole carrying cross-wires to support the trolley wire has been placed nearer to the track than a very careful person would have permitted under like circumstances, and the company knew of such condition, or by the exercise of such high degree of care might have known it in time to have remedied it, and prevented injury to a passenger therefrom, and failed to do so, it would be liable.—*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

Where a street railway company maintains a cross-beam carrying feed wires and bolted to one of the poles supporting a cross-wire which supports the trolley wire, the pole, cross-beam and wire are necessary parts of the equipment used in furnishing motive power, and the law imposes the same degree of care in providing such equipment as it does in furnishing safe cars in which passengers may ride.—*Id.*

#### ☞ 293. — Elevators.

Burden of proof of contributory negligence, see post, ☞ 316(1).

Elevators as carriers, see ante, ☞ 235.

Instructions, see post, ☞ 321(8).

**Sup. 1904.** Where a passenger was injured in an elevator, that a metal projection protruded from the floor directly in front of the open side of the elevator cage, that the removal of the projection was recommended by an expert, and that the passenger's dress caught on some obstruction or projection in the elevator shaft, causing the injury, are sufficient to show negligence in the maintenance of the elevator, and justify the jury in finding a causal connection between the negligence and the injury.—*Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 182 Mo. 597.

**App. 1893.** It is the duty of owners of elevators to make them reasonably safe for the uses to which they are put, and in so doing they should exercise that degree of care employed by reasonably prudent men in attaining the same end. Therefore an instruction is inaccurate which tells the jury that "no inference of negligence can be made against defendant in regard to said elevator, if you find from the evidence that it is such as is ordinarily used in like purposes by reasonably prudent persons engaged in the same kind of business." Mere usage by others is

not the sole criterion.—*Lee v. Publishers: George Knapp & Co.*, 55 Mo. App. 390.

294. **Management of conveyances.**

Contributory negligence, see post, 330.

Instructions, see post, 321.

Presumptions and burden of proof, see post, 316.

Questions for jury, see post, 320.

295. — **In general.**

295 (1). **In general.**

**Sup. 1891.** At the crossing of a horse and a steam railway, the view of the latter's track was obstructed until within 15 feet of it. A horse car was driven slowly upon the crossing, without warning from a gateman stationed at the crossing by the railroad company, until the horses were on the crossing, when, as an engine approached on a downgrade, the gateman shouted to the driver of the horse car to stop, and commenced to lower the gates guarding the crossing, but, when they were halfway down, shouted to him to go on, and began raising the gates; others shouted contradictory directions to him. The driver stopped, or nearly so, but, before he had stopped, plaintiff, a passenger in the horse car, in apprehension of a collision, jumped from the car, and thereby was injured. There was no real danger of a collision, nor from the driver's standpoint, any appearance of danger. He had his horses under control, and when directed by the gateman to go on, continued to cross the track. *Held*, that there was no negligence on the part of the driver which would render the street-car company liable for plaintiff's injuries.—*Kleiber v. People's Ry. Co.*, 17 S.W. 946, 107 Mo. 240, 14 L. R. A. 613.

**Sup. 1899.** The degree of care that a railroad company is bound to exercise for the safety of its passengers is not limited to the construction and equipment of the road, but includes service thereon.—*Cobb v. Lindell Ry. Co.*, 50 S.W. 310, 149 Mo. 135.

**Sup. 1903.** Where the conductor of an open street car knew that decedent's position on the end of a seat and in front of an upright stanchion was not reasonably safe, it was his duty to control the running of the car with a degree of care proportioned to the danger to which decedent was exposed.—*Van Horn v. St. Louis Transit Co.*, 95 S.W. 326, 198 Mo. 481.

**Sup. 1918.** It was not negligence for conductor and motorman to leave street car on slight incline, provided they first properly

secured car.—*Delfosse v. United Rys. Co. of St. Louis*, 201 S.W. 860.

Street railway was not responsible for injuries to girl passenger who jumped from car which began to move unattended down slight incline on which it had been stopped where railway was not responsible for car so moving.—*Id.*

**App. 1907.** Where the engineer of a passenger train failed to obey an order to stop at a station where plaintiff, a passenger on the train, alleged it was to meet and pass a train going in the opposite direction, whereupon the conductor suddenly and violently stopped the train by the application of the air from the rear, throwing plaintiff against one of the seats and injuring her, defendant, though chargeable with negligence in passing the station, in violation of the order, causing the necessity for the sudden and violent stoppage in order to prevent collision, was not negligent in making the stop for that purpose.—*Todd v. Missouri Pac. Ry. Co.*, 105 S.W. 671, 126 Mo. App. 684.

**App. 1917.** A carrier is not bound where he keeps the gate on the rear coach fastened to keep the door also fastened.—*Daly v. Pryor*, 198 S.W. 91, 197 Mo. App. 583.

295 (2). **Management of elevators.**

**Sup. 1903.** When one passenger in an elevator directs the operator to stop at a certain floor, it is not necessary for every other passenger who desires to get off there to repeat the direction; but it is the operator's duty to stop long enough for the passenger giving the direction, and any other passengers who desire so to do, to alight.—*Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246.

It is the operator's duty before again starting the car, to use reasonable care to ascertain if there are other persons in the act of getting off.—*Id.*

A carrier by elevator must allow reasonable time for passengers to enter and leave the car with safety in the exercise of ordinary care.—*Id.*

**Sup. 1903.** Where a passenger in an elevator, relying on a signal for a certain floor given by his copassenger, attempts to follow him in alighting at that floor, using due care, and when he is in the elevator door the operator suddenly closes it, pinning the passenger therein, and then raises the elevator, and afterwards, aware of the passenger's peril, low

ers it, crushing the passenger between the floor and the roof of the car, the operator is negligent, and the passenger is entitled to recover.—*Luckel v. Century Bldg. Co.*, 76 S.W. 1035, 177 Mo. 608.

**App. 1891.** Where it is not shown that it is a dangerous operation to open the gate of an elevator before the cage has stopped, it cannot be said that injury to a boy 10 years old, inflicted while he is thus opening the gate at the request of the operator, resulted proximately from his compliance with such request.—*Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402.

←295 (3). **Duty to notify passengers of danger.**

**Sup. 1904.** Where a street railroad, operating cars on parallel tracks, uses cars equipped with footboards on both sides for gaining access to the seats, there is no duty devolving on the company to post notices warning passengers to keep off the inner board, and its omission to do so is neither negligence nor evidence of negligence.—*Allen v. St. Louis Transit Co.*, 81 S.W. 1142, 183 Mo. 411.

**Sup. 1908.** Where a conductor on a car on which a passenger was killed by being struck by a car on the adjacent track, going in the opposite direction, saw the passenger on the back platform in distress protruding his head outside of the car and knew that the passenger was oblivious of the danger and also knew of the dangerous juxtaposition of the cars passing on the other track, he was negligent in not warning the passenger of the approaching and impending danger, from being struck by a car on the other track, in time to have averted the danger.—*Gage v. St. Louis Transit Co.*, 109 S.W. 13, 211 Mo. 139.

←295 (4). **Permitting passenger to ride in dangerous place.**

**Sup. 1906.** Where the seat in defendant's street car, which deceased occupied at the time of the accident, was insecure, the conductor would be presumed to have had knowledge thereof, and deceased having been thrown from the car because of her insecure and dangerous position in connection with the swaying of the car, it was immaterial to plaintiff's right to recover whether the car was running at an excessive rate of speed or not.—*Van Horn v. St. Louis Transit Co.*, 95 S.W. 326, 198 Mo. 481.

**App. 1917.** If street car conductor knowing that passengers are riding on steps permits them to continue there, it is his duty to

see that car is managed with highest degree of care demanded by circumstances.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

To make it negligence as to deceased for street car conductor to permit passengers to ride upon step of car, it is not essential that conductor should have known that deceased was particular person upon step.—*Id.*

←295 (5). **Acts in emergencies.**

**App. 1905.** The existence of a fight on a street car between the conductor and a negro passenger, in which the conductor was stabbed, did not constitute such an emergency as justified the motorman in stopping the car so suddenly as to disable its motive power and throw a passenger from the car and injure her.—*Willis v. St. Joseph Ry., Light, Heat & Power Co.*, 86 S.W. 567, 111 Mo. App. 580.

**App. 1922.** Where the motorman lost control of a street car while going down a hill, and jumped off, and the conductor advised plaintiff passenger to jump off, and she did so, and was injured, plaintiff could plead and submit to the jury two acts of negligence, or either of them: (1) The negligence of defendant in suddenly confronting plaintiff with a real or apparent danger of imminent injury on account of permitting the car to get beyond control, thereby terrifying plaintiff into yielding to the impulse or instinct of self-preservation; (2) negligence of conductor in negligently giving the alarm to alight from the car, and in advising and assisting plaintiff to alight, causing plaintiff to believe there was imminent danger in remaining on the car.—*Hellar v. Kansas City Rys. Co.*, 237 S.W. 811.

To support a charge of negligence as to passenger injured while jumping from street car of which motorman lost control on a hill, the peril must have been caused by negligence of the street railway, apprehension of peril from the standpoint of the passenger must have been reasonable, and the appearance of danger must have been imminent, leaving no time for deliberation, and, on the other hand, the danger must be judged by the circumstances as they appeared at the time, and not by the result.—*Id.*

Where motorman lost control of street car on a hill, and conductor negligently advised and assisted woman passenger to alight, in order to recover for negligence in giving the advice, the passenger must prove that a false alarm was given, causing her to believe there was imminent danger in remaining on



the car, and this belief must have been such as an ordinarily prudent person would have entertained under the same circumstances, and the passenger's action must have been such as would probably have been taken by an ordinarily prudent person, and must have been unaccompanied with any contributory negligence.—*Id.*

295 (6). **Duty to avoid misleading passengers as to movements of train.**

**App. 1906.** A carrier must exercise the highest degree of care in protecting its passengers, and, in making announcements during the transportation intended to influence the actions of passengers, it must observe such care as will make them intelligible to the different classes of people usually found in public conveyances and to guard against possible misunderstanding.—*Laub v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 550, 118 Mo. App. 488.

295 (7). **Effect of provisions of statutes or ordinances.**

**Sup. 1893.** An act prohibiting passengers from getting on and off street cars at the front end, and providing that the carrier shall not be liable for injuries received by passengers violating it, does not relieve the carrier from liability for so negligently managing its car that a passenger is thrown from the front platform.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1899.** The violation of a municipal ordinance, regulating the running of street cars, resulting in an injury to a passenger, cannot be made the basis of a civil liability by a mere allegation that such ordinance was in force and binding on defendant, since it must be alleged and proven that defendant agreed to be bound by the ordinance.—*Byington v. St. Louis R. Co.*, 49 S.W. 876, 147 Mo. 673.

295 (8). **Duty as to passenger who has fallen off.**

*See explanation, page iii.*

296. — **Overloading or crowding.**

**Sup. 1925.** Carrier not liable, if passenger pushed from car by another passenger while car standing still.—*Carlson v. Wells*, 276 S.W. 26, 42 A. L. R. 1319.

297. — **Rate of speed.**

**Sup. 1895.** Plaintiff, while on defendant's cable car, was thrown off by a sudden jerk of the car while rounding a curve. Plaintiff knew that the cars went at greater speed around that particular curve, and was cautious to avoid being thrown off. There was no defect in the appliances or in the con-

struction of the road, nor were the employees negligent. The evidence showed that the only practicable way to round the curve was to go at the speed of the cable; that the jerking was greater or less as the cable was slack or taut; that no method had been discovered to avoid these difficulties. *Held*, that the accident was not of a character for which defendant was liable.—*Hite v. Metropolitan St. Ry. Co.*, 31 S.W. 262, 130 Mo. 132, 51 Am. St. Rep. 555, rehearing denied 32 S.W. 33, 130 Mo. 132, 51 Am. St. Rep. 555.

**App. 1910.** It is no defense to an action for personal injuries to a street car passenger, by rounding a curve at too high a speed, to show that such speed was usual, where it was not unavoidable.—*Witters v. Metropolitan St. Ry. Co.*, 132 S.W. 38, 151 Mo. App. 488.

**App. 1915.** An inference of negligence is permissible where a street car motorman ran his car at high speed past a wagon close to the track when the car was so crowded that the injured passenger had to ride on the step.—*Moore v. Metropolitan St. Ry. Co.*, 176 S.W. 1120, 189 Mo. App. 555.

298. — **Sudden jerks and jolts.**

298 (1). **In general.**

**Sup. 1891.** Where, in a suit by a passenger against a railroad company for personal injuries, it appears that plaintiff was told by the porter of the train to go forward two cars at the next station, and that, after plaintiff started to go forward, the train started, jerking her off the platform, such starting of the train constitutes negligence on the part of defendant.—*Smith v. Chicago & A. R. Co.*, 18 S.W. 971, 108 Mo. 243.

**Sup. 1895.** In an action against a street railway company for injuries to a passenger resulting from being thrown off a car while turning a curve, the rate at which the car was going is immaterial, if it is shown that its speed was improper.—*Gidionsen v. Union Depot Ry. Co.*, 31 S.W. 800, 129 Mo. 392.

**Sup. 1895.** Where, in an action for injury from being thrown from a cable car while rounding a curve, the evidence clearly shows that the accident was caused by a lurch of the car on account of its speed, and that its speed was necessary to carry the car around the curve, a demurrer to the evidence should be sustained.—*Hite v. Metropolitan St. R. Co.*, 32 S.W. 33, 130 Mo. 132, 51 Am. St. Rep. 555, denying rehearing 31 S.W. 262, 130 Mo. 132, 51 Am. St. Rep. 555.

**Sup. 1808.** A common carrier of passengers is bound to allow its passengers reasonable time to enter and leave its cars, and, while it may start before a passenger has been seated, it must exercise the highest degree of care that prudent and cautious persons would use and exercise under similar or the same circumstances in starting its cars, so as not to suddenly jerk or jar him and thereby injure him.—*Barth v. Kansas City Elevated Ry. Co.*, 44 S.W. 778, 142 Mo. 535.

**Sup. 1899.** It appearing that jerks in the running of cable cars are unavoidable, because of the slack in the rope, negligence will not be imputed to the company merely because of such a jerk.—*Bartley v. Metropolitan St. Ry. Co.*, 49 S.W. 840, 148 Mo. 124.

**Sup. 1909.** Where one while exercising reasonable care was injured while boarding a street car by its sudden starting, and the servants in charge did not exercise the highest practical degree of care in starting the car, the company was liable for the injuries sustained.—*Wellman v. Metropolitan St. Ry. Co.*, 118 S.W. 31, 219 Mo. 126.

**Sup. 1921.** A street car passenger, suing for injuries sustained from the jerk of the car while he was riding thereon, and was not getting on or alighting, must allege and prove that the jerk was unusual or extraordinary.—*Laycock v. United Rys. Co. of St. Louis*, 235 S.W. 91, answering certified questions (App. 1920) 227 S.W. 883.

**Sup. 1925.** Care required and what constitutes violent or unusual jerk of car depend on conditions.—*Meyers v. Wells*, 273 S.W. 110.

**Sup. 1927.** It is actionable negligence to cause street car to give violent or unusual jolt, causing injury to passenger.—*Lalble v. Wells*, 296 S.W. 428, 317 Mo. 141.

Street car company must exercise utmost care in operating car so as not to jar or upset passenger.—*Id.*

Where street car starts with unusual or violent jerk, injuring passenger, company is liable, though jerk was necessarily incident to starting.—*Id.*

**App. 1883.** Sudden stoppage of train. See *Condy v. St. Louis, I. M. & S. Ry. Co.*, 13 Mo. App. 588, memorandum.

**App. 1896.** Where a crowded passenger train is standing at the station platform, it is the duty of a common carrier to use the great-

est practical care in attempting to attach another car to the rear of the train, and it is liable for an injury to a passenger caused by the jerking of the train in attaching such car.—*Choate v. Missouri Pac. Ry. Co.*, 67 Mo. App. 105.

**App. 1900.** A street railway company, before setting its cars in motion to cross a street on the flagman signaling the car to cross, is not required to give its passenger any warning thereof, unless they are discovered to be in a situation of danger, and it then becomes the duty of the employees in charge of the train to hold it until the danger is averted.—*Pryor v. Metropolitan St. Ry. Co.*, 85 Mo. App. 367.

The starting of a car while a passenger is standing in the aisle is not ordinary negligence, even if it be known to the conductor in charge of the car that the passenger is standing, unless the car is started with an unusual jerk, or the car is unskillfully handled by the gripman.—*Id.*

In an action against a street railway company to recover damages sustained by a passenger, it appeared that the car suddenly started and threw plaintiff, while standing in the aisle of the car, into a seat, causing injuries complained of. The car approached a street where, by the ordinances of the city, it was required to stop until signaled by a flagman to proceed. The stoppage of the train was not made to allow passengers to enter or leave the cars, the rules of the company and the ordinance of the city forbidding it to do so. While the car was standing, waiting to cross, on being signaled by the flagman, plaintiff, to allow a passenger to get into the aisle of a car, arose and stood in the aisle, and while standing there, the car started forward and plaintiff was thrown into a seat, causing the injury. *Held*, that instructions declaring that the employees in charge of the train were bound to know plaintiff's peril and to give him a warning before starting, whether they actually knew of his peril or, by the exercise of reasonable care could have known it, was erroneous.—*Id.*

**App. 1903.** Evidence of a passenger on a street car that she was thrown from the body of the car into the street by a sudden lurch thereof is sufficient to authorize a finding that there was such an unusual and severe lurching thereof as to constitute negligence.—*Ilges v. St. Louis Transit Co.*, 77 S.W. 93, 102 Mo. App. 529.

**App. 1904.** Where a railroad train has almost stopped at a station, a sudden jerk injuring a passenger is negligence.—*Moorman v. Atchison, T. & S. F. Ry. Co.*, 78 S.W. 1089, 105 Mo. App. 711.

**App. 1904.** In an action by a passenger for injuries sustained by reason of cars colliding with each other and causing a violent jar of the car in which the passenger was riding, an instruction that, though the jury might believe that the train broke into two parts and that the two parts collided and caused a jar, yet if such jar was not greater than the jars usually incident to the operation of such trains, then plaintiff must be held to have assumed the risk, and could not recover, was erroneous, because it is not the magnitude nor the insignificance of the cause that produced the injury which regulates the liability, but the question is whether there was want of care on the part of the company.—*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

**App. 1904.** Where a passenger notifies the conductor that she wishes to alight, and the car slows up on nearing the place, but starts suddenly when she is preparing to alight, she may recover for injuries resulting from being thrown to the ground by the jerk.—*Kroner v. St. Louis Transit Co.*, 80 S.W. 915, 107 Mo. App. 41.

**App. 1905.** Where the passengers on a freight train had received an invitation to get off, and the car had come to a stop, and, as a passenger was moving out, the carrier's servants, without any warning, moved the train with such force and suddenness as to send the car forward with a greater jump or jerk than witnesses in years of experience had ever known, the carrier was liable for whatever injuries resulted to the passenger from the act. Judgment (1904) 84 S.W. 175, affirmed on rehearing.—*Young v. Missouri Pac. Ry. Co.*, 88 S.W. 767, 113 Mo. App. 636.

**App. 1907.** A passenger who shows that the car stopped at a crossing to permit passengers to alight, and that he, while alighting, was thrown from the car by reason of the sudden starting thereof, establishes his right to recover.—*Glio v. Metropolitan St. Ry. Co.*, 103 S.W. 142, 125 Mo. App. 710.

**App. 1908.** The conductor in charge of a car called the name of a street. A passenger gave a signal for the car to stop. The car stopped before reaching its usual stopping place, but near to it, and the passenger attempted to alight, when the car suddenly

started, causing injury to her. *Held*, that the passenger had the right to assume that the car had stopped for the purpose of letting her alight, and it was the duty of the conductor to learn whether any passengers were preparing to alight before starting the car.—*Hufford v. Metropolitan St. Ry. Co.*, 109 S.W. 1062, 130 Mo. App. 638.

**App. 1908.** Although a passenger on a treet car is attempting to alight before the car has come to a stop, yet it is culpable negligence in the conductor, knowing what the passenger is doing, to cause the car to be suddenly started forward with such suddenness and force as to throw the passenger to the ground.—*Peck v. Springfield Traction Co.*, 110 S.W. 659, 131 Mo. App. 134.

**App. 1909.** A carrier admitting passengers on the rear coach of a train while coaches are being coupled thereto fails to exercise the high care imposed on it for the safety of its passengers when the coaches are shoved against the train with dangerous violence.—*Wise v. Wabash R. Co.*, 115 S.W. 452, 135 Mo. App. 230.

**App. 1909.** It is the duty of railroads to operate their passenger trains so as to avoid unnecessary jars and lurches that may injure passengers while moving about in a car.—*Flucks v. St. Louis, I. M. & S. Ry. Co.*, 122 S.W. 348, 143 Mo. App. 17.

**App. 1910.** If a street car passenger is about to reach his destination, and as the car is stopping he proceeds to the platform or steps to alight when the car stops, then if those in charge of the car starts it with a sudden jerk, and the passenger thereby sustains injuries, the carrier is liable, but the mere starting of a car with a sudden jerk causing injury to a passenger at a time when those in charge of it do not know, and have no reason to know, that the passenger is about to alight, does not constitute a cause of action.—*Ely v. Southwest Missouri R. Co.*, 125 S.W. 833, 141 Mo. App. 708.

**App. 1910.** To start a car with a sudden jerk while the passenger is alighting is evidence of negligence, in an action by the passenger for resulting injuries.—*Cooke v. Springfield Traction Co.*, 129 S.W. 265, 144 Mo. App. 451.

**App. 1910.** Where plaintiff, a passenger on defendant street railroad's car, was promised by the conductor that the car would stop at a usual stopping place, and, on the car's slowing down, stood on the step, holding to

the handrail, but through a sudden jerk of the car resulting from acceleration of speed was thrown to the ground and injured, defendant was liable; plaintiff being entitled to rely on the conductor's invitation to be prepared to alight.—*Chalmers v. United Rys. Co. of St. Louis*, 131 S.W. 903, 153 Mo. App. 55.

**App. 1911.** Where a street car on the signal of a passenger slows down at a customary stopping place, and the passenger prepares to alight, it is negligence for those in charge of the car to suddenly start it just before making the stop.—*Musick v. United Rys. Co. of St. Louis*, 134 S.W. 31, 155 Mo. App. 64.

**App. 1911.** The starting up suddenly and without warning of an electric car, with force enough to throw a departing passenger, and then stopping it again after going two or three feet, all this after it had come to a complete stop at the regular stopping place, is not a usual and ordinary movement of the car, on which negligence cannot be predicated.—*Elliott v. Metropolitan St. Ry. Co.*, 138 S.W. 663, 157 Mo. App. 517.

**App. 1912.** A street car company, whose vehicle is started before incoming passengers have seated themselves, is liable if it is started so violently that they are injured.—*Gabriel v. Metropolitan St. Ry. Co.*, 148 S.W. 168, 164 Mo. App. 56.

**App. 1913.** A street car company is not liable for injuries to a passenger thrown from a car by a jerk in coming to a stop, unless the jerk is an unusual one.—*Bobbitt v. United Rys. Co. of St. Louis*, 153 S.W. 70, 169 Mo. App. 421.

A street car company is liable for injuries to a passenger thrown to the ground by a sudden jerk in starting the car without warning while the passenger is preparing to alight, whether or not the jerk is an extraordinary one.—*Id.*

**App. 1915.** The term "violent stop," as applied to the stopping of a street car, must be given a relative meaning in keeping with the circumstances of the particular case.—*Allen v. Dunham*, 175 S.W. 135, 188 Mo. App. 193.

**App. 1915.** The starting of a street car without any sudden jerk was not negligence as to a passenger standing on the rear platform, holding to the handrail, but would be negligence as to a passenger who had placed one foot on the platform and was raising the

other foot to the platform.—*Bennett v. Metropolitan St. Ry. Co.*, 180 S.W. 1050.

**App. 1916.** Facts as to obstruction of aisle by grips and sudden stopping of train, causing passenger to trip over grip, and sudden starting as he was rising, *held* to show breach of carrier's duty.—*Abernathy v. Lusk*, 182 S.W. 1049.

**App. 1916.** If the operatives of a street car had neither knowledge that a passenger had arisen, nor reason to suppose she would arise, from her seat to leave the car, it was not negligence to accelerate the speed of the car with such a jerk as would not injure a passenger who was seated, although sufficiently violent to throw one down if standing.—*Modrell v. Dunham*, 187 S.W. 561, 564.

Motorman *held* negligent in causing a car to suddenly jerk after it had slowed up, and the conductor had called the street after telling a passenger she would be let off at such street.—*Id.*

**App. 1917.** When street car on which passengers were standing on steps was proceeding at moderate speed and suddenly jerked forward, sudden movement was *prima facie* unnecessary and negligent.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

**App. 1920.** Where plaintiff had already become a passenger on a car and paid his fare, and was standing upon the back platform and was injured by reason of a jerk, it was incumbent on him to allege and prove that the jerk or lurch which caused the injury was an unusual or extraordinary jerk, and one not incident to the ordinary operation of the car.—*Laycock v. United Rys. Co. of St. Louis*, 227 S.W. 883, certified questions answered (Sup. 1919) 235 S.W. 91.

**App. 1922.** A passenger suing for injuries caused by the sudden stopping of a street car while running between stops must show that the jerk or stop was unusual to make a case.—*Katon v. Kansas City Rys. Co.*, 241 S.W. 983.

**App. 1923.** A carrier of passengers owes them the duty of either waiting a reasonable time for them to be seated or of starting the car with a gradual motion so as to not throw them down.—*Rhodes v. Missouri Pac. R. Co.*, 255 S.W. 1084, 213 Mo. App. 515.

**App. 1928.** Street railroad *held* not liable for injuries to passenger on sudden stopping of car to avoid injuring automobile driver.—*Graber v. Wells*, 7 S.W.(2d) 719.

298 (2). Freight trains.

**Sup. 1901.** Plaintiff boarded a freight train in the switch yards, before it had reached the station, when it stopped at a water tank. The station agent told plaintiff that he should get on at the water tank. As the train approached the station, plaintiff stepped out of his seat to take off his overcoat, and while so occupied was violently thrown across the seats, by the train stopping at the station, receiving injuries. Plaintiff testified that he knew freight trains had to have more or less slack in the couplings, which caused jolts in starting or stopping. There was no evidence of defects in truck, train, or appliances, or any want of skill in the handling of the train, or that it stopped at an improper place. *Held*, that the shock was an incident necessary in the running of freight trains, which the plaintiff will be deemed to have assumed.—*Wait v. Omaha, K. C. & E. R. Co.*, 65 S.W. 1028, 165 Mo. 612.

**Sup. 1906.** A carrier was not liable for injuries to a passenger riding in a caboose, owing to the jar on the stopping of the train, where the jar was not sufficient to throw the passenger from his feet and there was no evidence of any defect in the construction of the roadbed or train or of any negligence in the management thereof.—*Hedrick v. Missouri Pac. Ry. Co.*, 93 S.W. 268, 195 Mo. 104.

**App. 1893.** A passenger on a freight train could not recover for an injury owing to the jolt of the car, it appearing that the jolt was caused by the taking up of the "slack" in the train when the locomotive reaching an ascending grade.—*Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462.

**App. 1903.** Where a passenger on a freight train was injured by a fall caused by a sudden jolt in the stopping of the train, but there was no evidence of any defect in the railroad's tracks, train, or appliances, nor tending to show any want of skill or care on the part of its employes in the management of its train, or that it was stopped in a negligent manner, there was no liability on the part of the railroad for such injuries.—*Portuchek v. Wabash R. Co.*, 74 S.W. 368, 101 Mo. App. 52.

**App. 1904.** While a passenger on a mixed train assumes the risk of jars and concussions incidental to its ordinary operation, he does not assume the risk of a jar occasioned by a collision between the cars after the parting of coupling, though it is no greater than those which are customary.—

*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

**App. 1905.** A jerk resulting from the movement of a freight train does not constitute negligence, unless it is so extraordinary as to be attributable to the unskillful handling of the engine, or some similar cause.—(1904) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, affirmed 88 S.W. 707, 113 Mo. App. 636.

**App.** A passenger on a freight train necessarily assumes the risk of perils arising from jolts, jars, or lurches ordinarily incident to the operation of such trains.—(1908) *Hawk v. Chicago, B. & Q. Ry. Co.*, 108 S.W. 1119, 130 Mo. App. 658; (1913) *Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S.W. 327, 178 Mo. App. 579; (1916) *Provance v. Missouri Southern R. Co.*, 186 S.W. 955.

**App. 1910.** One taking passage on a freight train assumes the risk of injury from such jars and movements as are incident to its operation, if its parts are well constructed and in good repair, and it is properly operated on a safe track.—*Ray v. Chicago, B. & Q. Ry. Co.*, 126 S.W. 543, 147 Mo. App. 332.

**App. 1912.** The management of a freight car loaded with household goods and live stock held negligent so as to make the carrier liable for injuries to the person in the car.—*Richmond v. Missouri Pac. Ry. Co.*, 144 S.W. 168, 162 Mo. App. 422.

**App. 1916.** A railroad is liable for damages suffered by a passenger on a mixed train only when the injury results from an unusual or extraordinary jerk, jolt, jar, or sudden movement.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S.W. 573.

299. — Passing other vehicles or objects.

Setting down passengers, see post, 303.  
Sufficiency of evidence, see post, 318.

**Sup. 1893.** Where plaintiff, while riding on the step of defendant's street car, was knocked off by a derrick standing near the track, the fact that the track had been moved nearer the derrick on the day of the accident tends to show negligence on the part of defendant's driver, as he must have known of its proximity to the cars, and for that reason should have used care to avoid exposing passengers to danger, and the question as to his negligence is for the jury.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1900.** Plaintiff, who was a newsboy and in the habit of boarding defendant's cars to sell his papers, jumped on the front end of a moving car, and, after passing along the footboard to the rear, was injured by being struck by the tongue of a wagon standing on the street. The car was moving at a moderate rate, and the motorman was looking forward, and defendant had made ineffectual efforts to prevent newsboys from jumping on its cars. *Held*, that defendant was not guilty of negligence, and a verdict in its favor was proper.—*Padgett v. Moll*, 60 S.W. 121, 159 Mo. 143, 52 L. R. A. 854, 81 Am. St. Rep. 347.

**App. 1878.** It is not the duty of a conductor to warn passengers that, if they allow their arms to project from the windows of the car, they may be injured by cars passing on a parallel track.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App. 1902.** Failure of a motorman to ring the gong as his car approaches another car on the next track going in the opposite direction, and stopping to allow passengers to alight, was negligence.—*Hornstein v. United Ry. Co. of St. Louis*, 70 S.W. 1105, 97 Mo. App. 271.

### ←300. — Collision.

Questions for jury, see post, ←320.  
Sufficiency of evidence, see post, ←318.

**Sup. 1889.** It appeared that the caboose in which plaintiff was sleeping when injured had become detached from its engine and train, and was resting at the foot of a long downgrade, when the forward part of a freight train, which had separated and become unmanageable, ran into it from the rear, causing the injury. The trainmen on the caboose knew that there was a freight train in the rear; that it would reach them on a long downgrade; that freight trains were liable to become detached, when they would not be under control; and that there was frost on the rails. The rear train could have been heard for two miles, but the trainmen flagged it only a fourth of a mile from the caboose, without warning plaintiff. *Held*, that they were guilty of gross negligence.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409.

**Sup. 1890.** A cable railway company is in duty bound to stop its car and let them remain at rest long enough for persons to get off and on with safety, and the servants in charge of an approaching train are in duty bound to govern their conduct accordingly.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.

W. 804, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541, rehearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

**Sup. 1895.** Evidence that plaintiff was in one of defendant's sleeping cars, and that the train was stopped at midnight, when partly across the line of an intersecting road, and allowed to remain across the track for five minutes, without any attempt being made to flag the trains of the other company, and that a train of the latter company collided with the car in which plaintiff was, justifies a finding that defendant was negligent.—*Clark v. Chicago & A. R. Co.*, 29 S.W. 1013, 127 Mo. 197.

A railroad company which allows a train filled with passengers to remain standing across the track of an intersecting road cannot, in defense to an action by an injured passenger, allege that it relied on the observance by the employees of the latter road of a statute requiring trains of intersecting roads to come to a full stop before going over crossings.—*Id.*

**Sup. 1899.** A street-railroad company may be liable to a passenger for injuries resulting from a collision caused by the conductor's want of a high degree of care in preventing a collision with a hook and ladder wagon going to a fire, as well as a want of a high degree of care by the gripman.—*Olsen v. Citizens' Ry. Co.*, 54 S.W. 470, 152 Mo. 426.

**Sup. 1903.** Where plaintiff was injured in a collision between an electric car, on which he was riding, and a car on which the president of the defendant company was riding, and the president knew there was another car out which would come in some time that evening, it was negligence for him to run his private car at a high rate of speed around a curve, where a coming car could not be seen, or to run it over that part of the road without taking proper precautions to prevent a collision with such incoming car.—*Hennessey v. St. Louis & S. Ry. Co.*, 73 S.W. 162, 173 Mo. 86.

**Sup. 1922.** A passenger on a street car was entitled to leave it when she saw a defective car running backward down a hill and that a collision was imminent, and was entitled to damages for injuries resulting when thrown to the street by such collision while in the vestibule attempting to alight.—*Walquist v. Kansas City Rys. Co.*, 237 S.W. 493.

Consult Pocket Part for later cases. For explanation, see page iii.

**App. 1888.** Where the drivers of two street railway companies approach an intersection of their tracks, and each has the means of seeing the vehicle of the other in time to stop his own vehicle before arriving at the point of intersection, and has control of his own vehicle so as to be able to stop it, but fails to do so and a collision occurs, there is evidence of negligence in both drivers.—*Kuttner v. Lindell Ry. Co.*, 29 Mo. App. 502.

**App. 1894.** Where there was no statute or city ordinance requiring a street car company to keep a watchman where its tracks crossed railroad tracks, it was error to instruct that it was the duty of the company to do so irrespective of whether the failure to do so was negligence.—*Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

**App. 1897.** A street car company is responsible for damages to a passenger caused by a collision between car and a vehicle not only in cases where its employé in control of the car saw the impending danger in time to avoid it, but as well where by the exercise of proper care he might have discovered it in time.—*Parker v. Metropolitan St. Ry. Co.*, 69 Mo. App. 54.

**App. 1901.** The act of a railroad in moving a north-bound train on its south-bound track because the north-bound track was blockaded with cars, at night, with the caboose in front containing passengers, and without the necessary and usual signals to prevent danger, was the grossest negligence.—*Fleming v. Kansas City Suburban Belt R. Co.*, 89 Mo. App. 129.

**App. 1903.** In an action for injuries to a passenger, an instruction that defendant was liable if plaintiff was injured in consequence of a head-end collision of its cars, if defendant's servants in charge of the car could have prevented such collision by the exercise of that high degree of care which would have been exercised by careful, skillful, railroad employes under similar circumstances, was a correct statement of the law.—*Robinson v. St. Louis & S. Ry. Co.*, 77 S.W. 493, 103 Mo. App. 110.

**App. 1905.** In an action against a street car company for injuries to a passenger in consequence of a car running into the car on which plaintiff was riding, the testimony of the motorman that he was unable to control the car on account of the slippery condition of the track, caused by loose leaves that had fallen on it and had been allowed to re-

main, shows negligence in failing to keep the track in a reasonably safe condition.—*Haas v. St. Louis & S. Ry. Co.*, 90 S.W. 1155, 111 Mo. App. 706.

**App. 1906.** The statute requiring street car companies to bring their cars to a stop before crossing a railroad track and send an employé forward to look out for trains, makes no exception to tracks where the view is unobstructed or where the railroad maintains gates.—*Mulderig v. St. Louis, K. C. & O. R. Co.*, 94 S.W. 801, 116 Mo. App. 655.

**App. 1906.** The motorman of a street car, on which plaintiff was riding, drove the same onto an embankment, where the tracks were so close that cars could not pass. At this time, a car having the right of way approached from the opposite direction, a third of a mile away, and could have been seen by the motorman, but he failed to stop his car. The motorman of the car having the right of way saw the danger, and stopped his car before it reached the danger point, but a collision occurred, the only excuse given for which being the slippery state of the rails. *Held*, that the motorman of the car on which plaintiff was riding was guilty of gross negligence.—*Goodloe v. Metropolitan St. Ry. Co.*, 96 S.W. 482, 120 Mo. App. 194.

**App. 1908.** It is the duty of the conductor of a street car, as well as the motorman, to use all means at hand to prevent collision with a fire department hose wagon at a street crossing, if he could have discovered the approach of the wagon by the exercise of ordinary care in time to have averted a collision; the railroad company being responsible alike under such circumstances for the negligence of either conductor or motorman.—*Williamson v. St. Louis & M. R. R. Co.*, 113 S.W. 239, 133 Mo. App. 375.

**App. 1911.** A motorman operating a car across a railroad crossing must hold his car in a place of safety until the crossing is clear, and until it is beyond the action of a train resulting either from its recoil or the reversing of its engine, and for him to run his car in immediately behind a slowly receding string of cars that may stop and return is negligence, notwithstanding any signal from the flagman.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

A motorman operating a car on a railroad crossing must know of the presence of trains there, and he cannot attempt to cross so long as a train is in striking distance, and

the failure of a brakeman on the train to warn the motorman of the approach of the train does not affect the charge of negligence of the motorman.—*Id.*

**App. 1920.** It is the duty of the operatives of a street car approaching a railroad crossing to use the highest degree of care to ascertain if there is any train closely approaching the crossing, to prevent injury to passengers on the street car.—*Bergfeld v. Dunham*, 228 S.W. 891.

⇨**301. — Derailment of railroad cars.**

*See explanation, page iii.*

⇨**302. Protection of passengers from incidental dangers.**

Proximate cause of injury, see post, ⇨305.

⇨**302 (1). In general.**

**App. 1878.** A conductor on a street car is not bound to warn a passenger not to put his elbow out if he sees it on the sill of the window, nor to watch to see that passengers keep their elbows inside of the car.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App. 1903.** Where the perilous position of a passenger standing on the steps of the rear platform of a rapidly moving street car was seen by the conductor, who was attempting to board the car, it was negligence on the part of the conductor to mount the steps in such manner as to collide with the passenger and throw him to the ground.—*Fleming v. St. Louis & S. Ry. Co.*, 74 S.W. 382, 101 Mo. App. 217.

⇨**302 (2). Duty to protect passenger from falling or flying objects.**

**App. 1919.** A railroad was not negligent in failing to screen passenger coach windows to prevent cinders from injuring a passenger.—*Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

⇨**302 (3). Injuries caused by opening or shutting door.**

**Sup. 1921.** Where an interurban car equipped with an automatic spring device to keep a door open was operated with the door open while the car was in motion, it was the duty of the carrier to keep the catch or spring in good condition.—*Anderson v. Kansas City Rys. Co.*, 233 S.W. 203.

**App. 1915.** An injury to a passenger hurt when the porter opened the door of the toilet room in a car held not an accident, but one for which the carrier was liable.—*Ward*

*v. Kansas City Southern Ry. Co.*, 175 S.W. 233, 189 Mo. App. 305.

**App. 1925.** Carrier not liable for failure to keep coach toilet door closed, resulting in injury to passenger's hand.—*Crabtree v. St. Louis & S. F. R. Co.*, 273 S.W. 1104, 218 Mo. App. 306.

⇨**303. Setting down passengers.**

Condition and use of premises, see ante, ⇨286.

Contributory negligence of person injured, see post, ⇨333.

Injuries received after passenger is set down at improper place, see ante, ⇨271, 272.

Instructions, see post, ⇨321.

Persons accompanying passengers, see post, ⇨304.

Pleading and proof, see post, ⇨315(1).

Presumptions and burden of proof, see post, ⇨316.

Proximate cause of injury, see post, ⇨305.

Questions for jury, see post, ⇨320.

Terminating status as passenger by delay in alighting, see ante, ⇨247(1).

⇨**303 (1). In general.**

**Sup. 1879.** A railroad company is bound to exercise the strictest vigilance in carrying passengers to their respective destinations and in setting them down safely, and are responsible for want of care and foresight in doing it, and are amenable for the direct and immediate consequences of errors committed by them.—*Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604.

**Sup. 1887.** Where the servants of a common carrier afford passengers a reasonable time to leave the cars after arrival at their destination, they have the right to presume after the expiration of such reasonable period that all the passengers whose place of destination is reached have left the cars.—*Hurt v. St. Louis, I. M. & S. Ry. Co.*, 7 S.W. 1, 94 Mo. 255, 4 Am. St. Rep. 374; *Id.*, 7 S.W. 5.

Where a reasonable time has elapsed after arrival at the destination, it is no part of the duties of the servants of a carrier to make personal inspection of or to interrogate the remaining passengers to see whether they intend to leave the cars, and if it appears that passengers similarly situated as the party complaining safely left the cars prior to any accident, this would afford ground for legitimate inference that sufficient time had been granted to the plaintiff suing for negligent injury to have alighted in safety.—*Id.*



**Sup. 1888.** An instruction that a railroad is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down thereat, is erroneous, the conductor's duty in that respect being merely to announce the station and give the passenger a reasonable opportunity to leave the cars.—*Hurt v. St. Louis, I. M. & S. Ry. Co.*, 7 S.W. 1, 94 Mo. 255, 4 Am. St. Rep. 374.

**Sup. 1903.** It is the duty of the operator of an elevator to give passengers therein a reasonable opportunity to pass safely from the elevator, and if he sees, or by the exercise of ordinary care can see, that a passenger is in the act of leaving the elevator, it is his duty to hold the car until the passenger has made his exit in safety.—*Luckel v. Century Bldg. Co.*, 76 S.W. 1035, 177 Mo. 608.

**Sup. 1904.** A carrier is bound to exercise the greatest care consistent with the practical operation of its cars toward a passenger, not only while he is on the car, but also until he has alighted in safety.—*O'Brien v. St. Louis Transit Co.*, 84 S.W. 939, 185 Mo. 263, 105 Am. St. Rep. 592.

**Sup. 1923.** A carrier owes the same high degree of care to discharge a passenger at his destination in a safe manner and place as is required for his safety while in transit.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1881.** If the employes of a carrier direct passengers where to leave the car, they are bound to use reasonable care to avoid injury to the passengers.—*Chance v. St. Louis, I. M. & S. Ry. Co.*, 10 Mo. App. 351.

**App. 1892.** A railway company selling a passenger a ticket for a designated station impliedly obligates itself to stop its train and remain at the station a sufficient length of time for the passenger to leave the train in safety.—*Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104.

**App. 1899.** Where a railway company did not stop its train at the station of a passenger's destination, or if it did stop it did not stop a sufficient length of time to afford the passenger a reasonable opportunity to leave the same, or if it stopped the car in which a passenger took passage at a place where it was dangerous or inconvenient for her to leave the car, the company is guilty of such a breach of duty as to render it liable to any injury resulting to the passenger therefrom.—*Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152.

**App. 1901.** A carrier is bound to put the passenger off at a safe place, and in doing so must exercise the highest degree of skill and care.—*Atkinson v. Pacific Ry. Co.*, 90 Mo. App. 489.

**App. 1904.** One having been accepted as a passenger on a railway train, the railway company was bound to exercise the highest degree of care of a prudent person under similar circumstances for the person's safety, and to be held to a strict responsibility therefor; and this rule is applicable where a train has stopped and a passenger is in the act of leaving one of its coaches.—*Moorman v. Atchison, T. & S. F. R. Co.*, 78 S.W. 1089, 105 Mo. App. 711.

**App. 1904.** While common carriers are not insurers of the safety of passengers, and are only answerable for casualties attributable to neglect of duty, yet the degree of care imposed upon them to secure the passenger's safety while he is getting off the vehicle is of the same lofty degree as that imposed while he is in course of transit.—*McKinstry v. St. Louis Transit Co.*, 82 S.W. 1108, 108 Mo. App. 12.

**App. 1907.** Where a passenger on an elevated street railway informs the conductor of her destination, the place thus designated being a regular stop, it is his duty to call such destination or otherwise notify her, and to stop the car a reasonably sufficient time for her to alight.—*Stevens v. Kansas City Elevated Ry. Co.*, 105 S.W. 26, 126 Mo. App. 619.

**App. 1908.** A passenger may rely on the promise of the conductor that he will let the passenger off at a designated place where passengers are regularly received and discharged and he need not give notice by ringing the bell of his wish to leave the car at such place.—*Moeller v. United Rys. Co. of St. Louis*, 112 S.W. 714, 133 Mo. App. 68.

A conductor accepting the notice of a passenger to stop the car at a designated point for him must without further notice signal the motorman to stop the car at the designated point, and must see that the passenger is afforded an opportunity to alight in safety.—*Id.*

**App. 1910.** A carrier is required to exercise the same degree of care for the passenger's safety while he is leaving its conveyance as is required while in transit; but the carrier is not the insurer of the safety of the passenger, who is held to exercise reasonable

care for his own safety.—*Craig v. Wabash R. Co.*, 126 S.W. 771, 142 Mo. App. 314.

**App. 1917.** Both freight trains carrying passengers and regular passenger trains must stop at suitable place long enough for passengers to safely alight.—*Patterson v. Lusk*, 196 S.W. 65.

**App. 1917.** A street railway company held chargeable, under the facts shown, with knowledge that a passenger would place himself in a position on the step preparatory to alighting when the car stopped for that purpose.—*Harriman v. Dunham*, 196 S.W. 443.

←303 (2). **Liability as to passenger alighting from moving car.**

**Sup. 1890.** The fact that the door of a cable car was left open and unguarded when a passenger alighted and was injured by a car coming from the opposite direction was no invitation for him to jump off when the car was running at full speed, however it might be regarded when the car was employed in receiving and discharging passengers.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.W. 804, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541, rehearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

**Sup. 1922.** Where a street car stopped, discharged and received passengers, started up again, and attained a speed of 18 miles per hour, an open vestibule door is not an invitation to alight, nor could it mislead one having the normal use of his senses in believing that the car was standing, notwithstanding a custom of keeping the door closed while the car was in motion.—*Kirby v. United Rlys. Co. of St. Louis*, 242 S.W. 79.

The conductor of a street car is not required to rivet his attention on the exit to the neglect of other duties after the car has stopped, discharged and received passengers, started up again, and attained a rapid rate of speed, in order to watch passengers who have reached the age of discretion, and restrain them, under ordinary circumstances, from stepping, or jumping, from the car.—*Id.*

**App. 1881.** In absence of contributory negligence, a street railroad company is liable for an injury resulting from its violation of the provisions of an ordinance which provides that conductors shall not allow ladies or children to leave or enter the car while same is in motion.—*Fortune v. Missouri R. Co.*, 10 Mo. App. 252.

**App. 1892.** The question whether an order or direction by a trainman to a passen-

ger to alight from a moving train amounted to negligence should be characterized and judged by the jury in light of the attending circumstances, the question depending on the speed of the train and whether it was day or night, the situation of the ground, etc.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 48 Mo. App. 224.

**App. 1902.** It is not the duty of a carrier to assist passengers in getting on and off cars in all cases, but where the passenger is infirm and his condition is known to the carrier, the carrier's duty to assist him while alighting must be performed with due regard to such condition.—*Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

←303 (3). **Operation and effect of statutes, ordinances, or other official regulations.**

**Sup. 1893.** In an action against a street car company for injuries received by a passenger in alighting, by a sudden starting of the car, it is competent for defendant to show that, by an ordinance under which its cars were operated, no car was allowed to stop for passengers, at the intersection of streets, until it had reached the further side of the street crossed, and that, when plaintiff undertook to alight, the car had only slackened its speed to await a signal from the flagman.—*Jackson v. Grand Ave. Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**App. 1885.** A statute prohibiting passengers from getting off street cars by the front platform does not release the carrier from liability for the act of the driver in so negligently handling the brake as to injure a passenger while he is so alighting.—*Nissen v. Missouri R. Co.*, 19 Mo. App. 662.

**App. 1903.** Plaintiff claimed that his wife was injured while alighting from defendant's street car by the negligent starting of the car, and defendant claimed that, after the car had stopped a reasonable time for passengers to alight, and had started forward, plaintiff's wife attempted to alight while the car was moving. *Held*, that a city ordinance that street car conductors should not permit ladies to leave a car while it was in motion did not justify an instruction that if, after plaintiff's wife so attempted to alight, the conductor could, by the exercise of reasonable care, have prevented her from alighting, and failed to do so, plaintiff might recover.—*Shreeman v. St. Louis Transit Co.*, 78 S.W. 846, 103 Mo. App. 515.

**App. 1906.** Though a city ordinance required street cars to stop on a certain side of

a street to receive and discharge passengers, the company being accustomed to stop elsewhere, it was liable for injuries to a passenger from the negligent starting of the car while she was alighting at that place.—*Parks v. St. Louis Transit Co.*, 96 S.W. 426, 119 Mo. App. 445.

**App. 1910.** An ordinance regulating street railways by providing that conductors shall not allow ladies or children to leave or enter cars while in motion modifies the common-law rule of negligence of carriers and contributory negligence of passengers, and a street car conductor who permitted a female passenger to attempt to alight while the car was in motion was negligent for which the street railroad was liable, unless the passenger was guilty of contributory negligence in leaving the car under the circumstances.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

**303(4). Starting train before passenger has alighted or while he is alighting.**

It is the duty of the carrier on stopping at a station to give the passengers sufficient time to alight in safety before again starting the train.

—**Sup. 1885.** *Straus v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo. 421;

**App. 1899.** *Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152; (1900) *Cullar v. Missouri, K. & T. Ry. Co.*, 84 Mo. App. 340.

It is the duty of a railroad company to stop its trains long enough to allow passengers acting expeditiously to leave them in safety.

—**Sup. 1905.** *Young v. Missouri Pac. Ry. Co.* (App. 1904) 84 S.W. 175, judgment affirmed 88 S.W. 767, 113 Mo. App. 636;

**App. 1904.** *Gress v. Missouri Pac. Ry. Co.*, 84 S.W. 122, 109 Mo. App. 716.

**Sup. 1881.** It is not the duty of a conductor of a railroad train after allowing a sufficient time for passengers to get off, regard being had to their age and physical condition, to pass along the train and examine each platform to see whether people are trying to get off.—*Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185.

If a train was stopped a sufficient time for a passenger to conveniently alight, and without any fault of the operatives he failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to

start while he was alighting, the railroad company was not liable.—*Id.*

Where the operatives of a railroad train did not stop the train long enough to enable a passenger by the use of reasonable expedition to get off before the train started, and it was started while he was in the act of alighting, whereby he was thrown down and injured, the carrier was liable.—*Id.*

**Sup. 1883.** In an action by a passenger for injuries received while alighting from defendant's train, an instruction that, if defendant's employé stopped the train at a station and plaintiff started to get off, it was negligence to start the train before she got clear of the cars upon the depot platform, was fatally defective: the rule being that if the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without fault of defendant's servants she failed to do so, and the conductor, not knowing and having no reason to suspect that she was in the act of alighting, caused the train to start, defendant would not be liable.—*Clotworthy v. Hannibal & St. J. R. Co.*, 80 Mo. 220.

**Sup. 1885.** Where a train stopped at a platform connected with a station, a passenger who intends to stop at such station has a right to believe, unless warned to the contrary, that the train has stopped to permit him to alight, and where the train is suddenly started while he is in the act of stepping therefrom, and he is thrown down and injured, the railroad company is liable.—*Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50.

**Sup. 1887.** Where a man becomes a passenger with his wife and little children, he has the supervision of their safety, and they are to be regarded as a unit, in so far as affording sufficient time to leave the car is concerned.—*Hurt v. St. Louis, I. M. & S. Ry. Co.*, 7 S.W. 1, 94 Mo. 255, 4 Am. St. Rep. 374; *Id.*, 7 S.W. 5.

**App. 1888.** Notwithstanding that a person in taking passage on a freight train took upon himself all the hazard, inconvenience, and rules of running, management, and jerking of such trains, a passenger is not thereby barred of his right to recover for an injury which was not the result of the ordinary method of running such trains, as where the evidence showed that after defendant had brought its cars to a standstill, and advised its passengers to alight, and while they were obeying its invitation, it carelessly and negli-

gently put its train in motion, whereby the injury was done.—*Jones v. Missouri Pac. Ry. Co.*, 31 Mo. App. 614.

**App. 1892.** If a train is stopped a sufficient length of time to enable a passenger, by the use of reasonable expedition, to get off before it again started, then the passenger has no right to complain of injuries received by the starting of the train while alighting.—*Culberson v. Chicago, M. & St. P. Ry. Co.*, 50 Mo. App. 556.

**App. 1909.** A railroad must exercise high care for the safety of a passenger while alighting, and to back the car while the passenger is alighting without waiting a reasonable time is actionable negligence, if injury results.—*Van Cleve v. St. Louis, M. & S. E. Ry. Co.*, 118 S.W. 116, 137 Mo. App. 332.

**App. 1910.** To start a car with a sudden jerk while the passenger is alighting is evidence of negligence, in an action by the passenger for resulting injuries.—*Cooke v. Springfield Traction Co.*, 129 S.W. 265. See Carriers, ¶298(1) in this Digest.

**App. 1910.** A carrier is bound to hold the train a sufficient length of time to give a passenger a reasonable opportunity to alight, and the knowledge of the carrier's servants that plaintiff was alighting at the time the train started is immaterial.—*Kirby v. St. Louis & S. F. R. Co.*, 130 S.W. 69, 146 Mo. App. 304.

**App. 1915.** A conductor, who starts his train without inquiry as to whether a passenger who has reached his destination has alighted, is negligent.—*Thomure v. St. Louis & S. F. R. Co.*, 177 S.W. 708, 191 Mo. App. 640.

**App. 1923.** Railroad companies are not required to hold their trains at all hazards until every one has alighted at stations, but only to allow a reasonable time to alight.—*Payne v. St. Louis-San Francisco Ry. Co.*, 256 S.W. 538.

¶303 (5). Starting street car before passenger has alighted or while he is alighting.

**Sup. 1893.** Where a street car is stopped for a signal from the flagman before it reaches a crossing, and a passenger is about to alight, with the knowledge of the conductor, it is the latter's duty to give the passenger a reasonable opportunity to get off before starting the car.—*Jackson v. Grand Ave. Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**Sup. 1904.** Where a street car stops or slows down to such a degree that it is reasonably prudent for a passenger to attempt to alight, and she so attempts, but while alighting the car starts forward so as to throw her down, the street railway is liable for a resulting injury, unless it can affirmatively show that such movement of the car could not have been prevented by the exercise of that degree of care which a carrier owes to a passenger.—*Reagan v. St. Louis Transit Co.*, 79 S.W. 435, 180 Mo. 117.

**Sup. 1904.** A street car conductor has no right to start his car while he sees or should see a passenger in the act of alighting although the passenger has already had ample time to alight, and has been unduly slow in so doing.—*Behen v. St. Louis Transit Co.*, 85 S.W. 346, 186 Mo. 430.

**Sup. 1909.** Where a street car stopped to permit a passenger to alight, and she attempted to do so in the presence of the conductor, he was bound to know that she was in the act of alighting, and to operate the car accordingly.—*Westervelt v. St. Louis Transit Co.*, 121 S.W. 114, 222 Mo. 325.

A passenger is entitled to a reasonable time in which to alight.—*Id.*

**Sup. 1912.** Railroad company held liable for accident caused by increase of speed of car as passenger was alighting, although motorman was not negligent, because he did not know that any one wanted to get off, since the conductor was negligent.—*Moeller v. United Rys. Co.*, 147 S.W. 1009, 242 Mo. 721.

**Sup. 1921.** Relative to liability of a street railway company to a passenger injured by being thrown from a car, as he was about to alight, when the motorman, after slowing down accelerated speed on a go ahead signal from the conductor, it is immaterial that the custom of the motorman to accelerate speed in such case was contrary to the company's rules.—*Chapman v. Kansas City Rys. Co.*, 233 S.W. 177.

**App. 1888.** Although the servants of a street car company were not notified of the desire of a passenger to alight before they stopped the car, but stopped the car for purposes connected with the operation of the road, yet, if before starting the passenger made known her intention of getting off, and the servants nevertheless started the car, thereby throwing the passenger to the ground as she was alighting, the company would be

liable in the absence of negligence on the part of the passenger.—*McDonald v. Kansas City Cable Ry. Co.*, 32 Mo. App. 70.

**App. 1891.** Street railway company held liable for injuries to a woman resulting from endeavors of conductor to hasten her departure from car.—*Mackin v. People's St. Ry. & Electric Light & Power Co.*, 45 Mo. App. 82.

**App. 1903.** The conductor of a street car, when he knows that passengers desire to leave his car at a certain street, must hold the car at a standstill until all of them have safely alighted, and see that all have done so before he gives the motorman his signal to start.—*Scamell v. St. Louis Transit Co.*, 76 S.W. 660, 102 Mo. App. 198.

**App. 1903.** Where a passenger on a street car has a young girl with her, extra time should be allowed her in alighting, in view of her delay necessary to assist her companion to alight.—*Hannon v. St. Louis Transit Co.*, 77 S.W. 158, 102 Mo. App. 216.

**App. 1904.** Where, in an action by a passenger to recover for injuries sustained while attempting to alight from a street car because of the sudden starting of the car, the evidence showed that the passenger had given the usual signal of his wish to get off the car, that the conductor in recognition of that signal had signaled the car to stop, that he saw the passenger leave his seat and go to the rear platform for the purpose of alighting, it became the duty of the conductor and motorman in charge of the car to hold it still for a reasonable length of time to allow the passenger to get off in safety, and the passenger was not bound, in order to recover, to show that the motorman and conductor knew of his position at the time the speed of the car was accelerated.—*Duffy v. St. Louis Transit Co.*, 78 S.W. 831, 104 Mo. App. 235.

**App.** A street car conductor has no right to assume because the car has been stopped for a time reasonably sufficient to enable passengers to alight that they have alighted, but is charged with the duty to see that no one is in the act of alighting when the car starts.—(1905) *Nelson v. Metropolitan St. Ry. Co.*, 88 S.W. 1119, 113 Mo. App. 702; (1907) *Murphy v. Metropolitan St. Ry. Co.*, 102 S.W. 64, 125 Mo. App. 269.

**App. 1905.** Where, in an action for injuries to a passenger by the premature starting of a street car as she was attempting to

alight, plaintiff had not communicated to the motorman her intention to get off—the motorman being only bound to watch the rear platform, where passengers generally were accustomed to alight, and see that no one was in the act of getting on or off before he started the car, and having done so—it was error for the court to charge, as a matter of law, that it was the motorman's duty to have seen and observed plaintiff until she reached the street in safety, before starting the car.—*Cramer v. Springfield Traction Co.*, 87 S.W. 24, 112 Mo. App. 350.

**App. 1906.** Where a street car stopped at a place where it was customary for it to discharge passengers it was the duty of the conductor, who saw that a passenger was alighting, to detain the car until she had alighted, irrespective of the reason for the stop.—*Parks v. St. Louis Transit Co.*, 96 S.W. 426, 119 Mo. App. 445.

**App. 1906.** It is the duty of a street car conductor, after the car has stopped to permit passengers to alight, to know before giving the signal to start that no one is in the act of getting on or off the car, and it is no excuse for his failure so to do that he is busy with other matters within the car.—*Hurley v. Metropolitan St. Ry. Co.*, 96 S.W. 714, 120 Mo. App. 262.

**App. 1907.** Though a car remained stationary for a time sufficient to have enabled a passenger to alight in safety by the exercise of reasonable diligence, this would not justify the starting of the car while she was in the very act of stepping to the street, and the carrier would be liable for resulting injuries without regard to the violence of the start.—*Green v. Metropolitan St. Ry. Co.*, 99 S.W. 28, 122 Mo. App. 647.

**App. 1907.** Where a street car is stopped for passengers to alight, it is the duty of the carrier's servants, not only to hold the car stationary a reasonable length of time for the passengers to alight, but to look to the places of exit to ascertain that no passenger is in the act of alighting before giving the signal to proceed.—*Bell v. Central Electric Ry. Co.*, 103 S.W. 144, 125 Mo. App. 660.

A street railroad company as a common carrier is bound to employ the highest degree of care to avoid injury to passengers, and, when signaled to stop at a regular stopping place, is required to bring the car to a complete stop, and hold it stationary until the departing passengers, in the exercise of

reasonable care, may accomplish their departure in safety.—Id.

**App. 1908.** Where a street car had stopped at a regular stopping place and passengers were getting on and off, it was the duty of the conductor, in the exercise of reasonable care, before giving the signal to start, to know whether a passenger is alighting.—*Alten v. Metropolitan St. Ry. Co.*, 113 S.W. 691, 133 Mo. App. 425.

**App.** A carrier must allow reasonable time for passengers to leave its cars with safety in the exercise of ordinary care.—(1909) *Jones v. Springfield Traction Co.*, 118 S.W. 675, 137 Mo. App. 408; (1910) *Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

**App. 1909.** A carrier's liability for injuries to a passenger caused by starting the car while she is alighting with care does not depend on the knowledge of its servants that she is in the act of alighting, where the car has been stopped in response to her request at a usual stopping place.—*Jones v. Springfield Traction Co.*, 118 S.W. 675, 137 Mo. App. 408.

**App. 1909.** Where a street car stopped at a crossing in response to a signal that a passenger desired to alight, there was a fair inference that the operatives knew, or should have known, that some person desired to alight, and should have exercised care not to start until assured that no one was in the act of alighting.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084, 142 Mo. App. 718.

**App. 1910.** If street car passenger as car is stopping proceeds to platform or steps to alight when car stops, then if those in charge of the car start it with a sudden jerk, and passenger thereby sustains injuries, carrier is liable.—*Ely v. Southwest Missouri R. Co.*, 125 S.W. 833. See Carriers, 298(1) in this Digest.

**App. 1910.** Where passenger on defendant street railroad's car, was promised by conductor that car would stop at usual stopping place, and, on car's slowing down, stood on step, holding to handrail, but through sudden jerk of car was thrown and injured, defendant was liable.—*Chalmers v. United Rys. Co. of St. Louis*, 131 S.W. 903. See Carriers, 298(1) in this Digest.

**App. 1911.** Where street car on signal of passenger slows down at customary stopping place, and passenger prepares to alight,

it is negligence to suddenly start it just before making stop.—*Musick v. United Rys. Co. of St. Louis*, 134 S.W. 31. See Carriers, 298(1) in this Digest.

**App. 1911.** The stopping of a street car at a usual stopping place is an invitation to alight, and the company's employees are negligent if they thereafter start the car without taking every reasonable precaution to see that passengers are not then alighting.—*Parker v. United Rys. Co. of St. Louis*, 133 S.W. 137, 154 Mo. App. 126.

**App. 1911.** The duty of a carrier safely to discharge a passenger embraces the duty to allow a reasonable time for the passenger to alight safely, and any movement of a street car after stopping to discharge a passenger in obedience to signal prior to expiration of a reasonable time is negligence, and in violation of the implied contract safely to carry and discharge him, imposed upon the carrier by law.—*Monroe v. United Rys. Co.*, 133 S.W. 645, 154 Mo. App. 39.

**App. 1911.** When a street car is stopped at a regular stopping place for the ingress and egress of passengers, the carrier should hold the car stationary while the passenger is making a reasonable effort to alight.—*Kinyoun v. Metropolitan St. Ry. Co.*, 134 S.W. 15, 153 Mo. App. 477.

**App. 1911.** Where the conductor and motorman had stopped the car to permit a passenger to alight, and knew or were bound to know that she was in the very act of alighting, they should not only hold the car stationary a reasonable length of time for her to alight, but should exercise a high degree of care to ascertain whether she had reached a place of safety before putting the car in motion.—*Jerome v. United Rys. Co. of St. Louis*, 134 S.W. 107, 155 Mo. App. 202.

**App. 1911.** A street railway company is a carrier of passengers and owes them the highest degree of care to carry them in safety, which duty continues while the passenger himself, in the exercise of reasonable care, is alighting at a place where the car is stopped therefor, and the car must not be started until a passenger has alighted in safety.—*Zeller v. Metropolitan St. Ry. Co.*, 134 S.W. 1067, 153 Mo. App. 613.

**App. 1912.** Where those in charge of a street car know that a passenger is in the act of alighting therefrom, they must exercise such care as would be exercised by a careful

and skillful man, under the same circumstances, to hold the car stationary.—*Gardner v. Metropolitan St. Ry. Co.*, 152 S.W. 98, 187 Mo. App. 605.

**App. 1913.** Street car company is liable for injuries to passenger thrown to ground by sudden jerk in starting car without warning while passenger is preparing to alight.—*Bob-bitt v. United Rys. Co. of St. Louis*, 153 S.W. 70. See Carriers, 329(1) in this Digest.

**App. 1915.** Rule that conductor may start steam train after stopping reasonable time at stations for passengers to board and alight on assumption that passengers are safe *held* not applicable to street cars.—*Paul v. Metropolitan St. Ry. Co.*, 179 S.W. 787.

Conductor of street car in city, under duty to exercise highest degree of care, must know before starting car that no passenger is in position of danger.—*Id.*

**App. 1920.** In passenger's action against street railroad for injuries sustained while attempting to alight from a car, evidence that motorman stopped car on signal to stop, that carmen knew that passenger intended to alight, and that while she was in the act of alighting the car started forward with a jerk, throwing passenger into street, *held* to establish *prima facie* case, without proof that the street at which the passenger was injured was a regular stopping place; it being immaterial to the liability of the railroad whether car customarily stopped at such street, since in the particular case it actually did stop to let the passenger off.—*Morris v. Kansas City Rys. Co.*, 223 S.W. 784.

**App. 1921.** Employes, having stopped a street car to allow passengers to alight, were required to ascertain whether any passenger was alighting before starting car without a reasonable time and opportunity having been given passengers in which to alight.—*Hartweg v. Kansas City Rys. Co.*, 231 S.W. 269.

**App. 1922.** It is the duty of a street railway company, not only to stop its car for a reasonable time for passengers to alight, but, before starting it, to see and know that they have safely done so, and are not in such a situation as to be imperiled by the sudden starting of the car.—*McCormack v. United Rys. Co. of St. Louis*, 238 S.W. 579.

**App. 1922.** A street car passenger, injured while alighting from a moving car, may recover damages if, as claimed, the conductor negligently opened the door and ordered him

to get off before the car had been brought to a stop, and the car was negligently given a sudden and violent jerk, and its speed suddenly and violently increased, while he was alighting, without giving him a reasonable time to alight.—*Leonard v. United Rys. Co. of St. Louis*, 239 S.W. 892.

**303 (6). Duty to provide safe place and means for alighting.**

**Sup. 1887.** The plaintiff was injured by falling over an embankment, while alighting from a train at a station where he lived, and with the approaches to which he was familiar. The train on which he was riding had not, however, stopped at the usual point, and the night was so dark that he could not see just where he was. Before he got off the station had been called, the train stopped, and the conductor had gone off with his lantern. *Held*, that these were facts tending to show negligence on the part of the company, and that the case should go to the jury.—*McGee v. Missouri Pac. Ry. Co.*, 4 S.W. 739, 92 Mo. 208, 1 Am. St. Rep. 706.

**Sup. 1902.** The tracks in a railway station were laid in pairs; between each pair there being platforms about 7 or 8 inches above the rails; and at intervals there were "cross-overs," or places where the platforms were even with the rails, such depressions being accomplished by inclining the platforms, the inclines being 15 feet long, and the rise about half an inch to the foot. *Held*, in an action for injuries sustained by a passenger on jumping from a moving train in the station, that there was no negligence in the construction of the platforms.—*Newcomb v. New York Cent. & H. R. R. Co.*, 69 S.W. 348, 169 Mo. 409.

**Sup. 1904.** The failure of a railroad company to keep its station platform in a condition reasonably safe for use by a person stepping from a moving train while in the exercise of ordinary care is negligence.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

**Sup. 1908.** The care required of a carrier for a passenger's safety while he is leaving the train is as high as that required during transit, and it must use extraordinary care to put passengers off at a reasonably safe place.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 103.

**Sup. 1909.** It is the duty of a carrier of passengers to carry them safely to their destination, and put them off at safe places.—*Cos-*

sitt v. St. Louis & S. Ry. Co., 123 S.W. 569, 224 Mo. 97.

**App. 1903.** Where a street car stops 15 feet beyond a street crossing, at a place where the ground slopes up from the track so as to be on a level with the car's step at a point reached by a passenger in her first step in alighting, but the place from all appearances is safe, there is no negligence sustaining the recovery by the passenger for straining the muscles of the leg in alighting.—*Lynch v. St. Louis Transit Co.*, 77 S.W. 100, 102 Mo. App. 630.

**App. 1905.** It is the duty of a street car company to avoid stopping its cars to discharge passengers where the condition of the street makes it dangerous to get off; the relation of carrier and passenger not ending till the passenger is off the car, and on the street in safety.—*Senf v. St. Louis & S. Ry. Co.*, 86 S.W. 887, 112 Mo. App. 74.

**App. 1910.** Where the conductor of a train invites a passenger to alight from a car in which he was riding at a dangerous place, the carrier is guilty of negligence.—*Austin v. St. Louis & S. F. R. Co.*, 130 S.W. 385, 149 Mo. App. 397.

**App. 1910.** A carrier of passengers must exercise the highest degree of care to safely transport passengers, and to give them a reasonably safe place at which to alight from the train at their destination, but it need not stop at the station platform.—*Deskins v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 45, 151 Mo. App. 432.

**App. 1911.** In furnishing its passengers a reasonably safe and convenient place at which to alight from its cars, a railroad company is not bound to stop its passenger coaches at any particular part of the station platform, or at the platform at all, provided the place where they are stopped be reasonably safe and convenient.—*Le Duc v. St. Louis, I. M. & S. Ry. Co.*, 140 S.W. 758, 159 Mo. App. 136.

The duty of a railroad company to furnish its passengers a reasonably safe place to alight from or enter its cars is not changed because the train is a mixed one, carrying both passengers and freight.—*Id.*

**App. 1917.** Where snow and ice are likely to be on step persons in charge of street car are required to anticipate possibility of passenger slipping.—*Bate v. Harvey*, 195 S.W. 571. See Carriers, ←292(2) in this Digest.

**App. 1923.** A street railroad which constructs a landing place for patrons and establishes lights to guide them in crossing the tracks thereby invites them to use the crossing and must keep it reasonably safe.—*Brooks v. Union Depot Bridge & Terminal R. Co.*, 258 S.W. 724, 215 Mo. App. 643.

←303 (7). Duty to warn passenger of dangers.

**Sup. 1908.** If it was dangerous for a passenger to alight from the front platform of a coach, and the conductor was at that platform, his failure to give warning thereof to an alighting passenger was negligence; and the company was negligent if none of its employes were at the platform to warn passengers of danger in alighting there, or in not directing them to get off at the rear platform.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

**App. 1904.** A passenger who is allowed to alight from a street car next to a ditch so entirely covered with water as to be indistinguishable should be warned or otherwise guarded against danger therefrom, if known to the employes in charge of the car.—*MacDonald v. St. Louis Transit Co.*, 83 S.W. 1001, 108 Mo. App. 374.

**App. 1909.** Where plaintiff's destination was called as the next stop, and a stop was then made at a siding before the station, and a trainman called the station, and plaintiff alighted in a ditch in the darkness, the carrier was negligent in not warning the passengers that the stop was not at the station.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497, 135 Mo. App. 254.

←303 (8). Duty to assist passenger in alighting.

**Sup. 1915.** Where it is necessary for the servants of a carrier to assist a passenger to alight, the same duty of exercising the utmost care and skill as during actual transportation continues.—*Walker v. Quincy, O. & K. C. R. Co.*, 178 S.W. 108.

A carrier of passengers cannot confine its carrying to the robust and strong; and where the servants in charge of a train saw that an aged woman, who was very heavy, needed assistance in alighting, they were bound to furnish it.—*Id.*

**Sup. 1924.** A conductor attempting to aid passenger in alighting owes duty in making such effort to use due care, and carrier is liable for his failure to use such care.—*Luckey*



*v. Missouri & K. I. Ry. Co.*, 264 S.W. 807, 305 Mo. 260.

**App.** It is not ordinarily the duty of the employes in charge of the car to assist passengers in leaving.—(1899) *Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152; (1902) *Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**App. 1910.** Trainmen need not in all cases assist passengers in alighting, and, where the place to alight is reasonably safe, assistance cannot be claimed by a passenger as a matter of right.—*Deskins v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 45, 151 Mo. App. 432.

**App. 1913.** Where carrier's agents and servants have notice that passenger's physical condition is such as to require assistance in alighting from car, and request for such assistance is made, it is its duty to render assistance necessary to protect him from injury.—*Layne v. Chicago & A. R. Co.*, 157 S.W. 850. See Carriers, 281 in this Digest.

303 (9). Injuries received after alighting and while leaving train or station.

**App. 1927.** That one killed by automobile while going from one street car to another had transfer would not authorize recovery from street railway company.—*Watts v. Fleming*, 298 S.W. 107, 221 Mo. App. 1123.

303 (10). Injuries received, after alighting, from cars on another track.

**Sup. 1895.** Plaintiff's decedent, in alighting at night from a car on a dummy line, with the operation of whose trains he was familiar, was struck by a train on the opposite track, and killed. The train on which he rode had just passed his station, but was coming to a stop when he got off. The conductor, however, lighted him off at the steps. *Held*, that the question of defendant's negligence was for the jury.—*McDonald v. Kansas City & I. Rapid-Transit Ry. Co.*, 29 S.W. 848, 127 Mo. 38.

**Sup. 1896.** An instruction in an action for injuries to a passenger in alighting from a street car by being struck by a car on another track is objectionable, which imposes on defendant the duty to run its car so that it might be stopped, if necessary in order to avoid striking passengers, without regard to the place and circumstances under which a passenger left the car.—*Van Natta v. People's Street Railway Electric Light & Power Co.*, 34 S.W. 505, 133 Mo. 13.

**App. 1889.** In an action against a street railroad company for personal injuries, it appeared that plaintiff had dismounted from one of defendant's cars and was passing over a junction for the purpose of entering another car. It was defendant's custom, as plaintiff knew, that the junction should be kept free from cars passing in one direction until those passing in the other direction had left it; but nevertheless, he was struck by a car going in the opposite direction to the one from which he had alighted. *Held*, that plaintiff was a passenger at least in so far that he was entitled to protection while passing over the tracks.—*Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

**App. 1910.** When a street car stops at a street crossing, it is a warning to others using the street that passengers may get off and pass to either sidewalk, and it is a situation to be considered in determining whether a given rate of speed of a car on another track is negligence.—*Moore v. Metropolitan St. Ry. Co.*, 126 S.W. 181, 142 Mo. App. 290.

**App. 1915.** Street car motorman ignoring practice of passengers to pass behind car and running past a standing car without having his car under such control that he could stop on the appearance of a person, *held* negligent.—*Moore v. Metropolitan St. Ry. Co.*, 180 S.W. 408.

303 (11). Passenger leaving train or car at other than regular station or place.

**App. 1903.** A street car company is liable for injuries to a passenger by a premature starting of the car while she was attempting to alight, though the car had not stopped at that point to permit passengers to alight, and it was not a usual stopping place, provided the conductor had knowledge that the passenger was attempting to alight there.—*Jacobson v. St. Louis Transit Co.*, 80 S.W. 309, 106 Mo. App. 339.

**App. 1906.** It was the custom of a street railway company to stop its cars to receive and discharge passengers at a switch, about fifty feet from an intersecting street, though an ordinance required the stopping of cars for taking and discharging passengers after crossing intersecting streets. A car on which a passenger was riding stopped at the switch. The passenger using ordinary care, undertook to alight, and the car was started before he could alight, causing him to fall. *Held*, that the company was liable for the injuries received.—*Gilroy v. St. Louis Transit Co.*, 92 S.W. 1152, 117 Mo. App. 663.

**App. 1907.** Where one in charge of a street car knows a passenger is alighting, the duty to him is the same whether the stop is made at a regular stopping place or not.—*Murphy v. Metropolitan St. Ry. Co.*, 102 S.W. 64, 125 Mo. App. 269.

**App. 1911.** Employés in charge of a street car stopping at a point near a street crossing where passengers customarily get off though such point is not a regular stopping place must exercise due care before again starting the car to see that passengers getting on or off will not be endangered by putting the car in motion.—*Monroe v. United Rys. Co.*, 133 S.W. 645, 154 Mo. App. 39.

Notwithstanding that the usual stopping place of a street car may be on the further side of a street intersection, yet if it stops before crossing the street, and a passenger is led to believe that it is in obedience to her signal to give her an opportunity to alight, it would be negligence of the carrier's servants in charge knowingly to allow the car to start while the passenger is alighting so as to throw her to the ground.—*Id.*

**App. 1911.** Where a street car is stopped at a place not intended for use as a passenger station, and for another purpose than the admission and discharge of passengers, the carrier should not start the car while a passenger is alighting, with the knowledge and consent of the conductor.—*Kinyoun v. Metropolitan St. Ry. Co.*, 134 S.W. 15, 153 Mo. App. 477.

**App. 1914.** Where the place a car was stopped was a mere safety stop, and the conductor did not know that a passenger was alighting, the company is not liable because the conductor ordered the car to start.—*Hayes v. Metropolitan St. Ry. Co.*, 170 S.W. 414, 182 Mo. App. 393.

☞303 (12). **Passenger set down before reaching station, platform, or other landing place.**

**Sup. 1890.** A passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barbed wire, but soon came to a bridge, to get over which he had to mount a flat car. Reaching the front of the car, and being anxious lest the train might start, he having first examined the ground, jumped from the coupling outward, with one hand on the car in front, and in landing broke his leg. *Held*, that the facts

did not constitute a cause of action.—(1889) *Adams v. Missouri Pac. Ry. Co.*, 12 S.W. 637, 100 Mo. 555, judgment modified on rehearing 13 S.W. 509, 100 Mo. 555.

**App. 1889.** In an action against a railroad company to recover for injuries sustained by a passenger by reason of the company stopping its train before reaching its depot, for the purpose of allowing passengers to alight, it appeared that the passenger when the train stopped went to the door of the car and was assisted in alighting by the porter, that she attempted to make her way to the depot, that she found she was between two trains, that the train she had left was moving in one direction and another train in another direction, that a storm was raging at the time, that it was dark, that in the darkness she fell down an embankment adjoining the railroad track into a pool of mud and water. *Held*, that the company was liable for the damages sustained.—*Warden v. Missouri Pac. Ry. Co.*, 35 Mo. App. 631.

**App. 1910.** A carrier stopping its mixed train before reaching the station platform, so as to make a step of three feet from the car step to the ground, which is dry and smooth, does not fail to perform its duty to give the passengers a reasonably safe place at which to alight, and, where a passenger is injured while alighting at such place because of her failure to leave her baggage on the step until she reaches the ground, the carrier is not liable.—*Deskins v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 45, 151 Mo. App. 432.

☞303 (13). **Passenger set down beyond station, platform, or other landing place.**

**Sup. 1899.** While a street car was crossing a street, a passenger signaled the conductor to stop, and the car slowed up, coming nearly to a standstill, between such street and the next one. The passenger attempted to alight, and was thrown by the sudden starting of the car. The company claimed that the car was slackened, as was customary, to enable the motorman to ascertain whether there were any cars on an intersecting line on the next street, and that the conductor understood the passenger's signal as one to stop at such street. *Held* that, under the circumstances, a very high degree of care was required of the conductor in regard to the signal.—*Cobb v. Lindell Ry. Co.*, 50 S.W. 310, 149 Mo. 135.

**Sup. 1905.** Plaintiff, a passenger, was carried beyond her station, when the conductor directed her to step out on a flat car, and

she was taken back by that means. On arriving at the station the switchman in charge assured plaintiff that there was no means of alighting except for her to jump, and assisted her to the ground. As a result of her thus alighting plaintiff suffered a miscarriage. *Held*, that there was negligence by defendant in placing plaintiff in so dangerous a position without other means of alighting, though the switchman rendered what assistance he could.—*West v. St. Louis Southwestern Ry. Co.*, 86 S.W. 140, 187 Mo. 351.

**Sup. 1920.** A carrier in carrying passenger safely to destination is not absolved of the high degree of care required merely because the passenger, on being carried past her station, is not injured in the very act of alighting, nor at the very spot or moment where and when she alighted.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**Sup. 1923.** It is the duty of carriers to stop trains for the discharge of passengers at the platforms provided therefor, and, if a passenger is carried beyond a station and required to alight at an unusual place and in darkness, he should be warned of any danger and given such assistance or instructions as are reasonably necessary to secure his safe return to the platform, and egress therefrom in the usual way.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1903.** A passenger on a railroad train having been carried by his station while asleep, the train was stopped, and at the request of a brakeman he followed to the platform, where he had a full view of the ground beside the track; but in stepping off he stepped on a piece of coal, whereby he fell and was injured. The passenger was a full-grown man, in vigorous health. *Held*, that the railroad company was not liable for negligence.—*Basscom v. Wabash R. Co.*, 76 S.W. 697, 102 Mo. App. 430.

**App. 1907.** The rule that where a passenger, knowing that he has been carried beyond his destination, voluntarily leaves the conveyance, he thereby terminates his relation as a passenger, and the carrier cannot be held liable for injuries afterwards sustained in traveling to his destination, does not obtain where the carrier's servants coerce or persuade the passenger to alight.—*Stevens v. Kansas City Elevated Ry. Co.*, 105 S.W. 26, 126 Mo. App. 619.

A passenger on a street railway, who, having informed the conductor of her destination, is carried by owing to the conductor's

failure to announce her destination, and on discovery is induced to alight by the representation of the conductor that she can reach her destination in safety by following his directions, remains constructively a passenger until she reaches her destination, and may recover for any injuries sustained from following negligent directions, but she is not so entitled to recover if she does not notify the conductor and remains in the car when her destination is announced, and the car stopped and passengers afforded a sufficient opportunity to alight.—*Id.*

### 304. Care as to persons accompanying passengers.

Instructions, see post, 321.

#### 304 (1). In general.

**Sup. 1907.** Where a child accompanied a passenger to a railroad station, and after the departure of the passenger's train, and while the child was standing on the platform, servants in charge of a locomotive caused steam to be discharged therefrom, causing the child to go upon one of the tracks in an attempt to escape from the steam, a contention that while upon such tracks she was a trespasser was without merit.—*Lange v. Missouri Pac. Ry. Co.*, 106 S.W. 660, 208 Mo. 458.

#### 304 (2). Condition and use of carrier's premises.

**App. 1910.** One who goes to a station for the purpose of escorting an outgoing passenger, or of meeting one whose arrival is expected, is neither a trespasser nor a licensee, and the railroad company owes him the duty of reasonable care.—*Winscott v. Chicago & A. R. Co.*, 131 S.W. 749, 151 Mo. App. 378.

Where plaintiff went to the station of the defendant to meet his son, and while in conversation on the outside of the platform he leaned or brushed against what appeared to be a heavy railing, but which in fact was so rotten that it gave way and caused him to fall and sustain injuries, the defective condition of the railing having existed for a long time, and the defendant being aware of it, defendant was liable, for such a railing is not entirely to mark the boundaries of the station, but to make a place for persons to stand in fair weather.—*Id.*

**App. 1914.** One waiting at defendant's station to meet a passenger was there by implied invitation, and defendant owed him the duty of exercising ordinary care to maintain its station buildings and platforms in reasonably safe condition for such use.—*Stark*

v. Chicago, R. I. & P. Ry. Co., 106 S.W. 850, 179 Mo. App. 225.

A railroad company was liable to a boy who, while awaiting the arrival of his father on a train, leaned against a loaded truck from which the support at one end had been broken off, and was injured by its coming down on his leg, as it was bound to anticipate such actions, and the premises were not safe when necessary to guard against such traps.—Id.

#### ←304 (3). Setting down from cars.

**Sup.** 1875. One who goes to a railway train in charge of a lady and her infant child is entitled to sufficient time to enable him to escort her to a seat and then to leave the train; and the railway company will be liable for an injury sustained by him, without his fault, where the stopping time was too short, or the employes in charge of the train failed to give the usual notice of its starting.—Doss v. Missouri, K. & T. R. Co., 59 Mo. 27, 21 Am. Rep. 371.

**Sup.** 1893. It is not negligence for a carrier to start its train at a station before a person who has assisted a passenger on board has had time to get off, unless it has notice of his intention to get off.—Yarnell v. Kansas City, Ft. S. & M. R. Co., 21 S.W. 1, 113 Mo. 570, 18 L. R. A. 599.

**Sup.** 1928. Railroad knowing that husband, assisting wife on train, was going to get off, *held* bound to exercise ordinary care in letting him off.—Lewis v. Illinois Cent. R. Co., 3 S.W.(2d) 371, 319 Mo. 233.

Railroad *held* to have continuing duty to exercise ordinary care for safety of husband assisting wife on train.—Id.

**App.** 1903. It is not negligence for a railway passenger carrier to start its train before a person who has entered such train with the intention merely "to speed a departing guest," or to assist one who is sick or infirm in getting a seat, has had time to alight therefrom, unless such person has communicated this fact to the servants in charge of the train.—Saxton v. Missouri Pac. Ry. Co., 72 S.W. 717, 98 Mo. App. 494.

#### ←305. Proximate cause of injury.

Contributory negligence as proximate cause, see post, ←339.

Injury received after alighting from train which has stopped at improper place, see ante, ←272.

Questions for jury, see post, ←320.

Sufficiency of evidence, see post, ←318(3).

#### ←305 (1). In general.

**Sup.** 1904. In an action against a railroad company for injuries to a passenger, caused by falling on a platform as he was stepping off of a train which he had boarded, thinking it the train he wanted, the defendant's negligence in failing to direct plaintiff to the right car was not too remote to justify a recovery, since the fact that the danger attending on alighting from the train was increased by the further negligent act of the defendant in reference to the condition of the platform did not relieve defendant from liability for the first act of negligence on the ground of remoteness.—Newcomb v. New York Cent. & H. R. R. Co., 81 S.W. 1069, 182 Mo. 687.

**App.** 1894. Where a brakeman's actions and exclamation, to "Jump for your lives!" were such as might ordinarily be expected to produce panic among the passengers and a belief of impending danger, the fact that the resulting action of another passenger added to plaintiff's terror, and operated as an additional inducement for his action, will not release the carrier.—Ephland v. Missouri Pac. Ry. Co., 57 Mo. App. 147.

**App.** 1906. A train regularly stopped twice at a town; the second stop being near a restaurant, where the train stopped for 20 minutes to allow passengers to procure supper. A passenger mistakenly left the train at its first stop at the town through the negligent misdirection of a brakeman. Before learning of the mistake, the train left him. There was no servant of the railroad present to guide him, and the passenger had no knowledge of the way to take to reach the train. A conductor of an independent carrier directed the passenger, who, while obeying the direction was injured in consequence of a defect at the end of the platform where the train stopped. *Held* that the proximate cause of the injury was the negligent misdirection of the brakeman rendering the railroad company liable.—Laub v. Chicago, B. & Q. Ry. Co., 94 S.W. 550, 118 Mo. App. 488.

Where a passenger was induced to leave the train by the negligent direction of the carrier, and he observed ordinary care in attempting to regain it, the carrier is liable for an injury received by the passenger, regardless of what other negligent cause co-operated in producing the injury.—Id.

**App.** 1906. Where plaintiff, who had shipped his horses in a freight car, on purchasing a ticket in order to ride with the horses, was informed by the ticket agent that

he would arrive at his destination at 5 p. m. and shortly before 5 p. m. the car reached a junction, where it remained all night, whereby he sustained injuries from exposure to cold in the car, and he testified that "every minute" he thought the train would start, the delay was the proximate cause of the injury though there was a station house at the junction in which plaintiff could have passed the night.—*Green v. Missouri, K. & T. Ry. Co.*, 97 S.W. 646, 121 Mo. App. 720.

**App. 1909.** Where plaintiff was injured while attempting to board a crowded street car at a point where the tracks ran so close together that passing cars sometimes touched, by being caught between the car and a car on the other track, the proximity of the tracks was the proximate cause of plaintiff's injury.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131, 138 Mo. App. 196.

**App. 1912.** A carrier is only liable for such injuries to a passenger as are the proximate result of the carrier's negligence.—*McFadden v. Metropolitan St. Ry. Co.*, 143 S.W. 884, 161 Mo. App. 652.

### 305 (2). Condition and use of carrier's premises.

**App. 1912.** The injury to one who, knowing a depot would not be heated or lighted at night, went to it two hours before time for his train and voluntarily got into a box car at the platform, occupied by a shipper, and in getting out fell, was not caused by any failure of the carrier to have the depot heated, lighted, and open a reasonable time before a train was due.—*Sweeney v. Missouri, K. & T. Ry. Co.*, 151 S.W. 198, 167 Mo. App. 137.

**App. 1917.** Defendant railroad's negligence in providing an inadequate luggage rack between seats in its station held the proximate cause of plaintiff's injury.—*Wright v. Kansas City Terminal Ry. Co.*, 193 S.W. 963, 195 Mo. App. 480.

**App. 1923.** Railroad's negligent maintenance of defective automatic door stop in depot held the proximate cause of injuries to passenger struck by door in passing out of depot upon way to train, though the passage of little girls through the door at the same time may have contributed to the cause of the accident.—*Martin v. Missouri Pac. R. Co.*, 253 S.W. 1083.

### 305 (3). Sufficiency and safety of means of transportation.

**App. 1907.** Where a street car conductor, in passing from a trailer to the grip car,

neglected to hook into its place a chain, which performed the office of a gate between the trailer and grip car, and a passenger who was standing on the platform of the trailer, on a sudden jerk of the car, was thrown forward so that he fell through the open place where the chain should have been, whereby he was injured, the absence of the chain, and not the jerk of the car, was the proximate cause of the injury.—*Hooper v. Metropolitan St. Ry. Co.*, 102 S.W. 58, 125 Mo. App. 329.

**App. 1912.** Where a motorman, after an explosion in the controller box, permitted the car to run for several blocks after the explosions and flames began, there was a causal connection between the panic among the passengers, by which plaintiff received a nervous shock, and the negligence of the motorman.—*Logan v. United Rys. Co. of St. Louis*, 148 S.W. 444, 166 Mo. App. 490.

**App. 1913.** Though one of the cars in a passenger train "climbed the rail" before reaching defective ties, where the wreck occurred, if it would not have occurred but for the decayed ties, the latter were the proximate cause of the accident.—*Williams v. Chicago, B. & O. Ry. Co.*, 155 S.W. 64, 169 Mo. App. 468.

**App. 1914.** Death of street car passenger pushed from rear platform by other passengers in leaving the car in haste, due to their alarm at a violent explosion of the controller, held the natural consequence of the negligence causing the explosion, as the passengers' alarm might reasonably have been anticipated.—*Agnew v. Metropolitan St. Ry. Co.*, 165 S.W. 1110, 178 Mo. App. 119.

### 305 (4). Management of conveyances.

**Sup. 1890.** Where a passenger alighted from an east-bound cable train running faster than the ordinances permitted, and was injured by a west-bound car, the speed of the car from which he alighted cannot be held to have had no direct agency in causing the injury.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.W. 804, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541, rehearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

**Sup. 1909.** If a street car passenger's death was directly caused by being thrown against a stove in the car by a derailment, recovery could be had even though he had also suffered from rheumatism, etc., if he would not have died when he did if he had not been thrown against the stove.—*MacDonald v. Met-*

ropolitan St. Ry. Co., 118 S.W. 78, 219 Mo. 468, 16 Ann. Cas. 810.

**Sup. 1922.** One injured while riding in a taxicab could not recover for mere violation of a speed ordinance unless it was the occasion of the injury.—*Varley v. Columbia Taxicab Co.*, 240 S.W. 218.

**App. 1904.** Where a passenger was thrown from a street car through the negligence of the employes, by a sudden start of the car, and fell between the feet of a mule hitched to a coal wagon, and the mule became unmanageable, causing the wagon wheel to pass over the passenger, the negligence of the street railroad was the proximate cause of the injuries.—*Parker v. St. Louis Transit Co.*, 83 S.W. 1016, 108 Mo. App. 465.

**App. 1905.** Plaintiff was a passenger on a train which became disabled between stations, and while in this condition was run into by another train, injuring many persons. Some one stated in plaintiff's hearing that another train was approaching from the rear, and there was about to be another collision, whereupon plaintiff left her car and went to the side of the track, where she was poisoned by poison ivy. *Held*, that plaintiff was entitled to recover from the railroad for the injury resulting from the poisoning.—*Estes v. Missouri Pac. Ry. Co.*, 85 S.W. 627, 110 Mo. App. 725.

**App. 1905.** Where, in an action for injuries to a passenger by the sudden stopping of street cars, following an assault by another passenger on the conductor, plaintiff's evidence did not show that such assault was the operation of a cause of the accident beyond the control of the carrier, it was proper to charge that if plaintiff, while a passenger, was thrown from the car and injured on account of the sudden stopping thereof she was prima facie entitled to recover.—*Willis v. St. Joseph Ry., Light, Heat & Power Co.*, 86 S.W. 507, 111 Mo. App. 580.

**App. 1905.** The movement of the elevator upward, as distinguished from the negligence of the elevator operator in moving the elevator when he knew or should have known that plaintiff's dress was caught in the door, was not the proximate cause of the accident, as a matter of law.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**App. 1908.** In an action by a street rail way passenger for injuries in a collision with a railroad train at a crossing, the fact that the railroad company ran its train at a speed in excess of that allowed by a city ordinance,

and was negligent in not slowing down or stopping when the engine operatives saw that the crossing gates were open, did not absolve the street railway company from liability, unless such negligence was the sole cause of the collision; the latter company being required to exercise the highest degree of care to avoid the collision.—*Wills v. Atchison, T. & S. F. Ry. Co.*, 113 S.W. 713, 133 Mo. App. 625.

**App. 1910.** Where a freight train passenger attempts to board it while moving and actually grabs the handrods and gets his feet on the caboose steps and is then thrown off by a jerk of the train, any antecedent negligent acts of the operatives inducing him to attempt to get on could not be the legal cause of the injury.—*Ray v. Chicago, B. & Q. Ry. Co.*, 126 S.W. 543, 147 Mo. App. 332.

**App. 1919.** One about to board an electric car is not entitled to damages for personal injuries received merely because the car came up to the point of embarkation at an excessive rate of speed, unless such excessive rate of speed was the proximate cause of the injury.—*Grubb v. Dunham*, 214 S.W. 256, 201 Mo. App. 504.

Where an electric car at an excessive rate of speed approached a station where several hundred persons were waiting, and several men jumped on the front platform of the car, and the negligent rate of speed naturally resulted in the knocking down of persons standing near the track, and plaintiff was knocked down by one rushing through the crowd to board the car, stumbling as she fell over those who were knocked down by persons on the front platform in such a manner as to slide under the car between the front and rear trucks, the negligent rate of speed was not the proximate cause of the injuries.—*Id.*

**App. 1928.** Statement of brakeman to shipper desiring to water stock that train would not be moved, if made, was proximate cause of injury to shipper lighting lantern, who fell when car was bumped.—*Lincoln v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 460.

#### ←305(5). Setting down passengers or persons accompanying passengers.

**Sup. 1882.** A passenger on a freight train on arriving at a station was informed by an employe in charge of the train to alight and take a caboose attached to another train. The passenger complied with the order, and on entering the caboose attached to the other train was ordered to get out, that the train was not ready to depart. He then walked to

an adjoining track, where a flat car stood, and there he stood, leaning against the car, when he was injured by a train backing the car. *Held*, that the order of the person in charge of the caboose attached to the second train was not the proximate cause of plaintiff's injury.—*Henry v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 288, 43 Am. Rep. 762.

**Sup. 1889.** Plaintiff, a shipper of cattle on defendant's train, on discovering that his cattle had been left behind, was told by the conductor that, at a certain station, there would be a train on which he could return to the place where the cattle had been left. At midnight the conductor said to plaintiff, "Here is your train," and "Be quick, and get off." The train which plaintiff was to board was about 10 feet away, and moving, and, at the third step after alighting, plaintiff fell into an uncovered water way between the tracks, and received the injuries complained of. The train stopped at a switch instead of the station, at which plaintiff was told the stop would be made. *Held*, that the proximate cause of the injury was the act of stopping near a dangerous place, and directing plaintiff to alight, knowing that it was not at the regular and presumably safe station where plaintiff expected to alight, without notifying him that it was a different or dangerous place, and without affording any means to discover or avoid the peril, and that this was gross negligence.—*Griffith v. Missouri Pac. Ry. Co.*, 11 S.W. 559, 98 Mo. 168.

**Sup. 1890.** Plaintiff, a passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barbwire, but soon came to a bridge, to cross which he had to mount a flat car. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward with one hand on the car in front and in landing broke his leg. *Held*, that his injury was the proximate result of defendant's neglect to carry him to the station, and that no negligence on his part contributed thereto.—(1889) *Adams v. Missouri Pac. Ry. Co.*, 12 S.W. 637, 100 Mo. 555, judgment modified on rehearing 13 S.W. 509, 100 Mo. 555.

**Sup. 1891.** Where a petition charged negligence of the driver of a street car in prematurely starting it while plaintiff was alighting, and the evidence supported the charge, the fact that a defective brake con-

tributed to the injury will not defeat a recovery, and constitutes no variance.—*Buck v. People's Street Ry. & Electric Light & Power Co.*, 18 S.W. 1090, 108 Mo. 179, affirming 46 Mo. App. 555.

**Sup. 1893.** Though defendant was guilty of a wrong in requiring plaintiff, a young woman, 16 or 17 years of age, to get off the train before reaching her destination, a rape committed on her by a male passenger, who also got off at the station at which plaintiff was compelled to alight, is not the direct and immediate consequence of defendant's wrongful act, where such station was not an inappropriate or unsafe place for a youthful and inexperienced female, traveling alone, to remain between trains.—*Sira v. Wabash Ry. Co.*, 21 S.W. 905, 115 Mo. 127, 37 Am. St. Rep. 386.

**Sup. 1903.** An injury received by a pedestrian by slipping on an icy sidewalk was not a circumstance which a street railway company should have foreseen would have been the probable consequence of its negligence in carrying such person, who was a passenger, beyond the street at which she desired to alight from the car.—*Haley v. St. Louis Transit Co.*, 77 S.W. 731, 179 Mo. 30, 64 L. R. A. 295.

The act of a street railway company in failing to stop the car in obedience to a passenger's signal at the crossing nearest to her residence, in consequence of which she was carried to the next crossing, cannot be said to constitute a wanton wrong, so as to make such act the proximate cause of an injury to such passenger, received by slipping on the sidewalk while she was walking back to her home.—*Id.*

The act of a street car company in negligently carrying a passenger one block beyond her destination is not the proximate cause of an injury sustained by her from a fall on an icy sidewalk while returning to the point of original destination.—*Id.*

**Sup. 1909.** The act of a street car company in carrying a passenger by his station, and directing him to alight in a dark and strange place near a dangerous culvert crossing the right of way and under the belief that he was near the station platform, is the proximate cause of his subsequent falling into the culvert from the end of the platform over it, mistaken for the station platform, in his effort to reach his destination.—*Cossitt v. St. Louis & S. Ry. Co.*, 123 S.W. 569, 224 Mo. 97.

**Sup. 1920.** If carrier discharged passenger at a place beyond her station, whereby

she was compelled to walk the track back to destination, the act of discharging was the proximate cause of her injury from being struck by another car.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**App. 1882.** Where a passenger was put off a train, and in returning by the track was injured, it is a question of fact whether the injury was the proximate result of the carrier's act.—*Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463.

**App. 1886.** A boy alighted from a street car while in motion and started to cross the street and was struck by a car coming from the opposite direction. *Held* that the negligence, if any, of the conductor of the first car in not stopping his car to allow the boy to alight, or in permitting him to alight while the car was in motion, was immaterial.—*Dunn v. Cass Ave. & F. G. Ry. Co.*, 21 Mo. App. 188.

**App. 1903.** Plaintiff alleged that while he was assisting his daughter to a seat in defendant's car, intending to then get off, as the brakeman knew, defendant negligently started the train, and when plaintiff reached the platform the train was moving so slowly that he could, without negligence, leave it safely, when, as he was on the lower step, the train was negligently jerked with such violence that he was thrown off and injured. *Held*, that the refusal to instruct that the starting of the train before plaintiff had alighted was not the proximate cause of the injury was error.—*Saxton v. Missouri Pac. Ry. Co.*, 72 S.W. 717, 98 Mo. App. 494.

**App. 1903.** The negligence of a street railway company in suddenly starting an open car, by reason of which a passenger standing between two seats, in the act of alighting, was thrown forward and toward the adjoining track, in which position he was struck by a car passing on the adjacent track, *held* the proximate cause of the injuries sustained.—*Scummell v. St. Louis Transit Co.*, 76 S.W. 690, 102 Mo. App. 198.

**App. 1903.** Running past a street crossing is not the proximate cause of injury to a street car passenger hurt in an attempt to alight.—*Lynch v. St. Louis Transit Co.*, 77 S.W. 100, 102 Mo. App. 630.

**App. 1905.** The negligence of a street railroad in failing to stop a car to allow a passenger to alight does not render it liable for an injury to the passenger by another car, by which he was struck after having alighted in

safety, where by standing still he could have avoided the injury from the car that struck him.—*Fry v. St. Louis Transit Co.*, 85 S.W. 960, 111 Mo. App. 324.

**App. 1906.** Where, in an action for injuries to an elevator passenger by the alleged sudden starting of the elevator before she had alighted, plaintiff's evidence warranted an inference that the movement of the elevator as plaintiff was about to leave it caused her to fall and thrust her foot between the floor of the car and the bottom of the adjacent elevator door, while defendant claimed that the catching of plaintiff's limb was due to the act of the elevator operator in pushing plaintiff backward after the elevator had started, the negligent act of the operator in prematurely starting the car was the proximate cause of the injury.—*Becker v. Lincoln Real Estate & Building Co.*, 93 S.W. 291, 118 Mo. App. 74.

←305 (6). Negligence of third person contributing to injury.

**Sup. 1899.** A street car passenger may recover for injuries occasioned by a collision with a hook and ladder wagon caused by a want of a high degree of care by the employees in charge of the car, though negligence of the driver of the wagon contributed to cause the accident.—*Olsen v. Citizens' Ry. Co.*, 54 S.W. 470, 152 Mo. 426.

**Sup. 1907.** Where plaintiff, a street car passenger, was injured by the derailment of a car caused by a brick maliciously placed on the track by a boy, and, though the motorman could have seen the brick in time to have stopped the car before striking it or at least reduced the speed so as to have prevented the derailment, he did neither, the malicious act of the boy was no answer to the street car company's liability for plaintiff's injuries.—*O'Gara v. St. Louis Transit Co.*, 103 S.W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

**App. 1914.** A street railroad's negligence in suddenly starting a car, concurring with the crowding of other passengers as the proximate cause of plaintiff's injury, made it liable as a joint tort-feasor.—*Stoltze v. United Rys. Co. of St. Louis*, 166 S.W. 1102, 183 Mo. App. 304.

**App. 1927.** Street railway company's negligence *held* proximate cause of death of one struck by automobile while crossing uncompleted viaduct to board car after leaving car at opposite end.—*Watts v. Fleming*, 298 S.W. 107, 221 Mo. App. 1123.



306. Companies or persons liable.

306 (1). In general.

**Sup. 1897.** Where the concurrent negligence of two street railway companies was the proximate cause of an injury to a passenger on a car of one of the companies, both companies are liable for the injuries sustained.—*Taylor v. Grand Ave. Ry. Co.*, 89 S.W. 88, 137 Mo. 363.

**Sup. 1903.** A street railway which builds a platform for passengers around a stump placed by an electric light company in a street is not liable, on the ground of maintaining the stump, to one who, hurrying to catch a car, fell over it.—*Lucas v. St. Louis & S. Ry. Co.*, 73 S.W. 589, 174 Mo. 270, 61 L. R. A. 452.

**Sup. 1920.** Train conductor, though liable to railroad by virtue of his contract for failure to exercise the highest practical care for the safety of the passengers, is not liable to passenger therefor; his duty to the passenger being merely to exercise ordinary care.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**App. 1881.** Liability of carrier for injury to passenger on one of its cars of which another carrier is the exclusive bailee. See *Smith v. St. Louis & S. F. Ry. Co.*, 9 Mo. App. 598, memorandum.

**App. 1912.** A passageway from a station of one railroad company to a station of another company was used interchangeably by the companies, and by persons having business with them. A person while taking his baggage from the depot of one of the companies was injured by an obstruction on the passageway by a truck of the company. The truck was not on the part of the passageway which the company maintained and controlled. It was not shown that the truck had been left there by any employé of such company. *Held*, that because of the failure to show that the company owned or controlled alone, or with the other company, the place at which the truck was left, there could be no recovery against it.—*Reynolds v. St. Louis Southwestern Ry. Co.*, 142 S.W. 1097, 162 Mo. App. 618.

**App. 1915.** In an action for injuries to a street car passenger against the company and its receivers, the fact that the receivers were operating the car *held* conceded, so that the company was entitled to a directed verdict.—*Moore v. Metropolitan St. Ry. Co.*, 176 S.W. 1120, 189 Mo. App. 555.

306 (2). Lessor and lessee.

**Sup. 1885.** By the terms of a contract between defendant and another railway company defendant's trains were to be drawn over the road of such company between the town of Pacific, defendant's eastern terminus, and the city of St. Louis, which lay east of Pacific. Defendant furnished, at its own expense, all the trainmen for the management of its trains, and such other company furnished its own locomotive and crew, reserving exclusive control of the trainmen and trains. Plaintiff's husband took passage at St. Louis on a train of cars owned by defendant, to go to a station between St. Louis and Pacific, purchasing a ticket from the other railroad company. *Held*, that plaintiff could not hold defendant liable for injuries received by her husband, resulting in his death, which were received in attempting to get off the train and were due to the negligence of those operating the train.—*Smith v. St. Louis & S. F. Ry. Co.*, 85 Mo. 418, 55 Am. Rep. 380.

**Sup. 1907.** Since Rev. St. 1899, § 1187, expressly authorizes a street railway company to lease its property, and since section 4160 provides that when technical words having a peculiar meaning are used in a statute they shall be understood according to their technical import, a street railroad company leasing its property and franchises to another street railroad company is not liable for an injury to a passenger resulting from the negligence of the employés of the latter company; the word "lease" importing a contract by which one person divests himself and another person takes possession of property for a term.—(1906) *Moorshead v. United Rys. Co.*, 96 S.W. 261, 110 Mo. App. 541, judgment affirmed 100 S.W. 611, 203 Mo. 121.

**Sup. 1907.** Since Rev. St. 1899, § 1187 [Ann. St. 1906, p. 1001], expressly authorizes a street railway company to lease its property, and since section 4160 [Ann. St. 1906, p. 2252], provides that when technical words having a peculiar meaning are used in a statute they shall be understood according to their technical import, a street railroad company leasing its property and franchises to another street railroad company is not liable for an injury to a passenger resulting from the negligence of the employés of the latter company; the word "lease" importing a contract by which one person divests himself and another person takes possession of property for a term. Order (1906) 96 S.W. 261, affirmed.—*Moorshead v. United Rys. Co. of St. Louis*, 100 S.W. 611, 203 Mo. 121; (1907) *Burleigh v.*

Same, 102 S.W. 624, 124 Mo. App. 708; Gilroy v. Same, 102 S.W. 1197, 125 Mo. App. 19.

**Sup. 1909.** Where by an agreement between two street railroads one of them as lessee took possession of the tracks, cars, plant, and former business of the other, and continued to operate the road, the lessor company was thereby relieved of liability for the negligence of the servants and employees of the lessee resulting in injuries to passengers.—Westervelt v. St. Louis Transit Co., 121 S.W. 114, 222 Mo. 325.

**Sup. 1909.** The lease of a street railroad, giving the lessee entire control of its operation for a term of years, relieves the lessor from liability for an injury to a passenger resulting from the negligence of the lessee's employees.—Graefe v. St. Louis Transit Co., 123 S.W. 835, 224 Mo. 232.

**Sup. 1923.** Undertaker who leased an automobile and a chauffeur was liable for injuries to passenger caused by negligence of chauffeur in driving passengers from funeral under a contract of carriage, even though the undertaker did not own the automobile and did not pay the chauffeur's salary.—Mahany v. Kansas City Rys. Co., 254 S.W. 10, 29 A. L. R. 817.

**Sup. 1927.** Lessor railroad *held* not liable for injury to passenger caused by lessee's receivers.—Hulen v. Wheelock, 300 S.W. 479, 318 Mo. 502.

☞306 (3). **Who liable for injuries occurring on chartered cars.**

**App. 1905.** In an action by a passenger for injuries in a collision, a statement on plaintiff's ticket that it was issued by a certain person, "excursion agent, Kansas City," did not justify an inference that the excursion agent was in charge of the train upon which plaintiff was a passenger, but, on the contrary, indicated that the ticket was sold by a person who was defendant's agent for the sale of excursion tickets.—Estes v. Missouri Pac. Ry. Co., 85 S.W. 627, 110 Mo. App. 725.

☞306 (4). **Joint liability.**

**App. 1912.** A passenger on a sight-seeing automobile, who was injured through the negligence of the motorman on a street car, may sue the street car company and the owner of the automobile, either jointly or severally.—McFadden v. Metropolitan St. Ry. Co., 143 S.W. 884, 161 Mo. App. 652.

**App. 1914.** Where a street car passenger was injured by the sudden starting of the car

as she was alighting, causing her to step into a hole in the pavement, the facts were sufficient to establish a joint wrong on the part of the carrier and the city authorizing an action against both jointly.—Reynolds v. Metropolitan St. Ry. Co., 168 S.W. 221, 180 Mo. App. 138.

☞307. **Limitation of liability.**

What law governs, see ante, ☞234.

☞307(1). **Power to limit liability in general.**

**Sup.** A carrier of passengers cannot stipulate against liability for its own negligence.—(1884) Tibby v. Missouri Pac. Ry. Co., 82 Mo. 292; (1894) Jones v. St. Louis S. W. Ry. Co., 28 S.W. 883, 125 Mo. 606, 26 L. R. A. 718, 46 Am. St. Rep. 514; (1914) Powell v. Union Pac. R. Co., 164 S.W. 628, 255 Mo. 420; Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 259 Mo. 450, Ann. Cas. 1916B, 317.

☞307 (2). **Power to limit liability for injuries to person riding free or at reduced rates.**

**Sup. 1914.** Where a railroad company engaged an attorney to act as its local counsel, and gave him an annual pass in consideration of his agreement not to accept any cases against the company, the attorney, though using the pass on his own business, was a passenger.—Powell v. Union Pac. R. Co., 164 S.W. 628, 255 Mo. 420.

**Sup. 1922.** In an action in the state against a railroad carrier for an injury occurring in the state to a person accepted and being carried as a passenger on an interstate free pass, a carrier's liability is determined by the state laws, and conditions in the pass exempting the carrier from liability for injuries caused by its negligence are void.—McGrath v. Payne, 245 S.W. 1061.

**Sup. 1924.** Stipulations on back of interstate free railway pass, relieving carrier from liability for injury, *held* valid and complete defense to action for user's death under Hepburn Act June 29, 1906.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, 41 A. L. R. 1092, certiorari denied 45 S. Ct. 123, 266 U. S. 623, 69 L. Ed. 473.

**App. 1888.** A railroad is required to exercise that extraordinary care and skill required in the transportation of passengers for hire toward a gratuitous passenger riding on a pass containing a stipulation to assume all risk of accident and damage without claim upon the railroad.—Bryan v. Missouri Pac. Ry. Co., 32 Mo. App. 228.

**App. 1912.** A carrier cannot relieve itself from liability for consequences of its negligence by a contract of a passenger contained in a free pass.—*Huckstep v. St. Louis & H. Ry. Co.*, 148 S.W. 988, 166 Mo. App. 330.

**App. 1928.** Passenger signing provision in reduced fare ticket, exempting railway from liability for accidents, *held* entitled to recover for injury sustained in derailment.—*Alexander v. St. Louis-San Francisco Ry. Co.*, 2 S.W.(2d) 165, 221 Mo. App. 271.

It is only by granting gratuitous transportation that carrier may exempt self by contract from liability.—*Id.*

307 (3). Power to limit liability for injuries to person accompanying freight.

**Sup. 1885.** A drover transported over a railroad upon a pass for the purpose of taking care of his stock on the train is a passenger for hire, and the railroad company cannot limit its liability for injuries to him resulting from its negligence.—*Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 239, 57 Am. Rep. 382.

307 (4). Validity of contract and assent of passenger thereto.

*See explanation, page iii.*

307 (5). Authority of master to exempt carrier from liability for injuries to servant.

*See explanation, page iii.*

307 (6). Operation and effect of limitation.

**Sup. 1903.** Clause in a contract of shipment of live stock permitting plaintiff to accompany the stock, but requiring him to ride in the caboose while the train was in motion, and providing that whenever he should leave the same, or pass over or along the cars or tracks, he should assume the risk, was no defense to an action for injuries to plaintiff received while in the car, caring for the stock, while it was standing still on the track, owing to other cars being bumped into it with great force; there being a further provision in the contract devolving the duty of "feeding, watering, bedding, and otherwise caring for the live stock" on plaintiff.—*Bolton v. Missouri Pac. Ry. Co.*, 72 S.W. 530, 172 Mo. 92.

The clause in the contract would not be any defense even if plaintiff had no right to be in the car with the stock; it appearing that the conductor knew that he was there, and that just prior to the accident other cars had been bumped into the car with such force as

to knock down some of the stock, and that plaintiff was caring for them; it being the conductor's duty, under such circumstances, to either prevent further recklessness on the part of defendant's employes, or to warn plaintiff to get out of the car.—*Id.*

**App. 1924.** Where plaintiff sustained relation of passenger to defendant carrier at time of falling in ditch on way to train, *held*, that fact that accident prevented defendant from transporting plaintiff on train did not enable plaintiff, for purpose of preventing defendant from asserting violation by him of his contract, to give written notice of injury to invoke rule that in case of dependent provisions failure of performance by one party relieves other party.—*Edmondson v. Missouri Pac. R. Co.*, 264 S.W. 470.

Under the common law, a carrier may waive a provision for written notice of injury to passenger.—*Id.*

As to clause in contract with shipper of cattle, allowing him free transportation as caretaker of the cattle, but requiring him to notify local agent in writing of injury to person within 30 days after such injury, action by carrier upon verbal notice to extent of making full investigation within 30 days *held* to amount to waiver of written notice; purpose of such clause being not to escape liability, but to afford carrier opportunity to make investigation, when facts are ascertainable.—*Id.*

In view of actual knowledge by carrier's agents of injury to plaintiff passenger and of action taken by carrier upon that knowledge, letters written by plaintiff to carrier's claim agent within 30 days after injury that he intended to assert claim for damages, and was willing to make settlement, *held* substantial compliance with his contract to give written notice within 30 days after injury.—*Id.*

**App. 1926.** Purpose of requirement of written notice of injury to cattle caretaker within stated period is to give carrier opportunity to investigate while facts are easily obtainable.—*Edmondson v. Missouri Pac. R. Co.*, 286 S.W. 439, 220 Mo. App. 294.

Duty of injured cattle caretaker accompanying interstate shipment to give notice of injury *held* governed by common law.—*Id.*

Under common law, provision for written notice of injury may be waived.—*Id.*

Immediate investigation of injury and offer to settle *held* a waiver of written notice

of injury under caretaker's contract executed by cattle shipper.—*Id.*

**App. 1928.** Shipper's contract did not absolve railway from liability for negligence in stopping train at night with caboose beyond ditch and directing cattle caretaker to go to caboose.—*Edmondson v. Missouri Pac. R. Co.*, 8 S.W.(2d) 103.

Under common law carrier could waive notice in writing of injuries to cattle caretaker.—*Id.*

### 308. Connecting carriers.

*See explanation, page iii.*

### 309. Actions for injuries.

### 310. — Nature and form.

Construction of pleading, see post, 315(1).

**App. 1908.** As a general rule, where a passenger is injured by a breach of the carrier's public duty, the remedy is in tort; the wrong done to the passenger and the violation of the public duty being the gravamen of the action.—*Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88, 134 Mo. App. 282.

In those jurisdictions where the common law obtains, an action by a passenger against a common carrier for personal injuries may be maintained either for the breach of the contract of carriage or for the breach of the public duty to exercise a high degree of care.—*Id.*

### 311. — Rights of action and defenses.

**Sup. 1915.** A passenger has no cause of action for derailment of the train except to the extent of resulting injury to him or to some right growing out of his relation.—*McGuire v. Chicago & A. R. Co.*, 178 S.W. 79, L. R. A. 1915F, 888.

**App. 1907.** If a conductor stops a car in violation of a company's rule prohibiting stops between cross-streets at a passenger's request to allow her to alight, and while she is alighting the car starts, causing her injury, the rule affords no defense, for the conductor is the company's vice principal for the time, and the company is liable for his acts in negligently starting the car.—*Dreyfus v. St. Louis & S. Ry. Co.*, 102 S.W. 53, 124 Mo. App. 585.

### 312. — Jurisdiction and venue.

*See explanation, page iii.*

### 313. — Parties.

*See explanation, page iii.*

### 314. — Pleading.

Conformity of instructions to pleadings, see post, 321.

Contributory negligence, see post, 343.

### 314 (1). Declaration, complaint, or petition in general.

**Sup. 1878.** In the case of a common carrier, the law implies a contract that the passenger shall pay his fare for being carried, and that he shall be safely carried, and an express contract need not be averred.—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

**Sup. 1889.** A petition alleged that defendant was a common carrier; that plaintiff shipped on its road certain cattle; that it was necessary for him to accompany them; that at C. defendant negligently side-tracked the cattle, without plaintiff's knowledge, and proceeded with the balance of the train and plaintiff; that on discovering the accident, and that the cattle had been unloaded, plaintiff was informed by the conductor that he would stop the train at a station at which there would be a train returning to C., which plaintiff could board. The petition then detailed the personal injuries sustained by plaintiff in attempting to board the returning train, and charged that they were caused by defendant's negligence in leaving the cattle at C., and in certain other matters relating to the time and place of receiving the injuries, and "that, by reason of said injuries," plaintiff had been "damaged in the sum," etc. *Held* that, while the petition contained much superfluous matter that might have been stricken out on motion, it stated but one cause of action.—*Griffith v. Missouri Pac. Ry. Co.*, 11 S.W. 559, 98 Mo. 168.

**Sup. 1889.** In an action for an injury alleged to have occurred while plaintiff was a passenger in defendant's caboose attached to a freight train, the petition need not allege that defendant's agent in charge of the caboose was authorized by defendant to carry passengers.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409.

**Sup. 1892.** The fact that a passenger in his action against a company states in his complaint defendant's negligence to have been in directing him to get on the train while in motion, thereby requiring him, perhaps, to prove more than if he had simply alleged negligence by reason of defendant's failure to stop at the platform, does not help defendant in sustaining the defense of contributory neg-

ligence.—*Fulks v. St. Louis & S. F. Ry. Co.*, 19 S.W. 818, 111 Mo. 335.

**Sup. 1908.** A petition, alleging that defendant's street cars regularly stopped at a designated point to discharge and receive passengers, that plaintiff attempted to enter a car at that point, and that, while in the act of doing so, defendant's servants negligently started the car forward with a violent jerk, is not subject to the objection that it states no cause of action, because not alleging that the car had stopped to receive passengers, the allegation that the car "started," by necessary implication, being an allegation that the car was stationary at the time.—*Peterson v. Metropolitan St. Ry. Co.*, 111 S.W. 37, 211 Mo. 498.

**Sup. 1915.** Plaintiff's allegations, in an action for injuries while riding in a freight car, *held* not to allege waiver of contract provision that he was to remain in caboose.—*Rawlings v. St. Louis & S. F. R. Co.*, 175 S.W. 935.

**Sup. 1920.** Petition *held* to show plaintiff's intent was to state a cause of action by a passenger against a carrier for injuries received, notwithstanding language describing place of accident where plaintiff was struck by car as a crossing continually used as such by the public with railroad's acquiescence, and as a place where trainmen could have reasonably expected to find persons; such language being disregarded.—*Banks v. Kansas City Rys. Co.*, 217 S.W. 488, 280 Mo. 227.

**Sup. 1920.** Petition of passenger on defendant electric railway's train injured in collision with freight train while crossing intersecting railroad track *held* to state a good cause of action against the electric railway company.—*Hoover v. St. Louis Electric Terminal Ry. Co.*, 227 S.W. 77, reversing order (App. 1919) 216 S.W. 984.

**Sup. 1921.** Allegations that defendant for a month prior to plaintiff's injury well knew that the elevator in his building was in a dangerous condition and could not be run without imperiling lives, that a city inspector notified defendant it was dangerous and a certificate would not be issued until the cables were renewed, that, notwithstanding, defendant continued to operate it, that during the time of such continued operation it fell while plaintiff was riding on it, injuring plaintiff, and that defendant's conduct was reckless and wanton, with a prayer for exemplary damages, warranted recovery thereof.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**App. 1903.** The complaint, having alleged that the car "stopped," was sufficient to permit evidence that the car stopped and suddenly started, thereby injuring plaintiff's wife, and therefore stated a cause of action, though it was uncertain as to whether plaintiff intended to count on an accident due to the starting of the car from a motionless state, or one due to the car reducing its speed instead of stopping.—*Shareman v. St. Louis Transit Co.*, 78 S.W. 846, 103 Mo. App. 515.

**App. 1905.** Where a petition in an action for injuries to a passenger on a street car alleged that the motor was defective but also charged that the machinery, appliances, and parts of the car were defective, such allegation was sufficiently broad to include not only the motor but all the other electric appliances with which the car was equipped.—*Brod v. St. Louis Transit Co.*, 91 S.W. 993, 115 Mo. App. 202.

**App. 1906.** An allegation in the petition, in an action against a street railway company for injuries received by a passenger while attempting to board a car in consequence of its sudden starting, that the car came to a stop when signaled, is a matter of inducement, and the negligence consists in the starting of the car.—*Forrester v. Metropolitan St. Ry. Co.*, 91 S.W. 401, 116 Mo. App. 37.

**App. 1908.** A petition in an action against a carrier which alleges negligence of servants in charge of the "railroad, train, and roadbed" alleges that the track was defective, though the word "roadbed" does not include track and ties, since the word "railroad" is broad enough to include the roadbed and the superstructure including cross-ties, rails, and fastenings.—*Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S.W. 1082, 130 Mo. App. 162.

**App. 1910.** A general allegation in a petition in an action for injuries to a passenger on a street car that the car was started before the passenger had time to be seated, and that injury resulted therefrom, states a cause of action.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1910.** A complaint which alleged that plaintiff was boarding a car of defendant, and while stepping on the lower step to enter the car, and before she had time to do so, an employé of defendant, knowing that plaintiff was so boarding the car, or could have known by ordinary care, negligently gave the motor-man a signal to start, and he quickly started the car, throwing plaintiff against the rear of the car and injuring her, states a cause of ac

tion.—*Brown v. Springfield Traction Co.*, 125 S.W. 236, 141 Mo. App. 382.

**App. 1910.** A petition in an action for injuries to a passenger, which charges facts showing the existence of the relation of carrier and passenger at the time of the injury, sufficiently alleges the liability of the carrier, and it need not in terms charge that the act of the agent of the carrier causing the injury was within the scope of his authority.—*Austin v. St. Louis & S. F. R. Co.*, 130 S.W. 385, 149 Mo. App. 397.

A petition in an action for injuries to a passenger on a freight train, which alleges the wrecking of a part of the train, and which avers that the conductor thereafter requested the passenger to leave the caboose and go forward with him to assist in saving property, that the passenger attempted to leave the caboose which had stopped on a high embankment, and that he being unacquainted with the surroundings fell down the embankment and was injured, sufficiently charges that the injuries were the proximate result of the negligence of the conductor during the continuance of the relation of passenger and carrier, and that the conductor was in the line of his duty, so that the carrier was liable.—*Id.*

**App. 1912.** In an action by a passenger of a sight-seeing automobile, injured in collision of the automobile and a street car, the petition *held* to state a cause of action against the owner of the automobile as a joint tortfeasor.—*McFadden v. Metropolitan St. Ry. Co.*, 143 S.W. 884, 161 Mo. App. 652.

**App. 1914.** A petition, in an action by a passenger injured by the sudden starting of a car, *held* to state a cause of action, though not alleging it was stopped at a regular stopping place.—*Hays v. Metropolitan St. Ry. Co.*, 170 S.W. 414, 182 Mo. App. 393.

**App. 1915.** A petition for injuries to a street car company *held* sufficient after verdict to sustain a judgment against the receivers, notwithstanding inconsistent allegations of management by the company.—*Moore v. Metropolitan St. Ry. Co.*, 176 S.W. 1120, 189 Mo. App. 555.

**App. 1927.** Petition, alleging that plaintiff was passenger on wrecked train, and that his injuries were directly caused by carrier's negligence, states cause of action under rule of *res ipsa loquitur*.—*Curry v. St. Louis-San Francisco Ry. Co.*, 296 S.W. 473, 221 Mo. App. 1.

### ←314 (2). Allegations as to negligence in general.

In an action for injuries to a passenger, it is sufficient to charge negligence in general terms.

—**Sup. 1909.** *Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709;

**App. 1905.** *Hamilton v. Metropolitan St. Ry. Co.*, 89 S.W. 893, 114 Mo. App. 504; (1912) *Black v. Metropolitan St. Ry. Co.*, 144 S.W. 131, 162 Mo. App. 90; (1919) *Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

**Sup. 1880.** In an action against a railroad company, the petition alleged in substance that plaintiff had shipped several car loads of cattle, and that by the contract of shipment he was also a passenger charged with the duty of looking after the cattle; that the train stopped at a water tank, and plaintiff was informed by one in charge of the car that the train would stop 10 minutes; that he alighted from the train and had walked but a few steps, when the train started and plaintiff took hold of one of the ladders on a car in order to draw himself up, when the car again started violently, so as to throw plaintiff off. *Held*, that the petition stated a good cause of action, though defectively.—*Pry v. Hannibal & St. J. R. Co.*, 73 Mo. 123.

**Sup. 1882.** A petition, in an action against a street railway company to recover damages sustained by a passenger, alleged that plaintiff became a passenger on defendant's cars, that he paid the usual fare, that before arriving at his destination the car by reason of the negligence of the driver ran off the track, that the driver ordered the passengers therein to alight and walk while he drove the car in order to get the same on the track, that plaintiff in obedience to the order alighted and walked on the track behind the car while the driver endeavored to get the same on the track, that while so walking the rear door of the car fell from its place and struck plaintiff, and that the door was not properly fastened. *Held*, that the gist of the charge was not the negligent management of the car by the driver, but the negligence relied on was the defective condition of the car.—*Gilson v. Jackson County Horse Ry. Co.*, 76 Mo. 282.

**Sup. 1884.** A petition, in an action against a railroad company to recover damages for personal injuries received by plaintiff while a passenger on one of defendant's trains, considered, and *held* to sufficiently charge defendant with negligence.—*Coudy v. St. Louis, I. M. & S. Ry. Co.*, 85 Mo. 79.

**Sup. 1900.** Plaintiff may plead negligence generally and rely upon the doctrine of *res ipsa loquitur*, and allegations that decedent's death was caused by the sudden derailment of the car because of the negligent condition of the appliances or the negligent management of the car by the employes only charged negligence generally, and did not allege particular acts of negligence.—*MacDonald v. Metropolitan St. Ry. Co.*, 118 S.W. 78, 219 Mo. 468, 16 Ann. Cas. 810.

**Sup. 1912.** A petition in a passenger's action for injuries *held* to contain merely a general, and not a specific, charge of negligence; and hence the doctrine of *res ipsa loquitur* applied.—*Stauffer v. Metropolitan St. Ry. Co.*, 147 S.W. 1032, 243 Mo. 305.

**Sup. 1912.** Facts constituting carrier's negligence toward a passenger must be pleaded, either by a charge of special negligence, or of general negligence, stating facts with sufficient certainty to point the adversary to the event or the occurrence in the happening of which negligence is charged.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

**Sup. 1920.** Second amended petition, alleging relation of passenger and carrier and injury of plaintiff in collision caused by negligence of defendant, in general terms, sufficiently alleged defendant's negligence, in view of presumption arising from fact of collision.—(*App. 1919*) *Hoover v. St. Louis Electric Terminal Ry. Co.*, 216 S.W. 984, order reversed 227 S.W. 77.

**Sup. 1921.** In a street car passenger's action for injuries, a petition alleging that the car moved with a sudden and unexpected jerk, pulling the car forward with such force as to throw some one in the inside of the car against the door, breaking the glass, and causing it to strike plaintiff in the eyes and face, sufficiently alleged that the jerk was an extraordinary and unusual movement of the car.—*Laycock v. United Rys. Co. of St. Louis*, 235 S.W. 91, answering certified questions (*App. 1920*) 227 S.W. 883.

**Sup. 1921.** Mere allegations that the relation of carrier and passenger existed and that, while it existed, the passenger was injured in connection with the carriage, without the further averment, in general terms at least, that the injury resulted from the carrier's negligence, do not state a cause of action.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**Sup. 1925.** Petition *held* to state case under doctrine of *res ipsa loquitur*.—*Carlson v. Wells*, 276 S.W. 26, 42 A. L. R. 1319.

**Sup. 1925.** General allegations of negligence permitted, where plaintiff has no knowledge of specific character of act causing injury.—*Porter v. St. Joseph Ry., Light, Heat & Power Co.*, 277 S.W. 913, 311 Mo. 66.

**Sup. 1927.** Petition of passenger injured in collision *held* to state cause of action against railroad and brick company whose servant opened switch.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**Sup. 1928.** Allegation of failure to warn passenger of opening of car door at time of collision *held* no part of charge that door was negligently opened.—*Morris v. Union Depot Bridge & Terminal R. Co.*, 8 S.W.(2d) 11.

**App. 1903.** In an action for injuries to one who had entered defendant's train with a departing guest, an allegation that defendant caused its train to "jerk suddenly and quickly" is not sufficient, without an allegation that the jerk was extraordinary, or more than a usual and inevitable accident.—*Saxton v. Missouri Pac. Ry. Co.*, 72 S.W. 717, 98 Mo. App. 494.

**App. 1904.** Specifications of negligence, in an action for injuries to a passenger while boarding a street car, in that the car was started before plaintiff was afforded a reasonable opportunity to board the same, and that it was not stopped subsequently to avert the peril impending in plaintiff's jeopardous situation, were not inconsistent.—*Shanahan v. St. Louis Transit Co.*, 83 S.W. 783, 169 Mo. App. 228.

**App. 1905.** In an action against a railroad company by a passenger for injuries in a collision, allegations that, through the negligence of defendant's agents, and in disregard of plaintiff's rights and safety and defendant's duty to plaintiff, the trains were permitted to collide, etc., were sufficiently definite, without a more precise specification as to the acts of negligence of which defendant was guilty.—*Estes v. Missouri Pac. Ry. Co.*, 85 S.W. 627, 110 Mo. App. 725.

**App. 1906.** In an action against a street railway for injuries, a petition alleging that defendant's car was stopped to receive plaintiff as a passenger, and that while she was getting on, and when by ordinary care defendant's employes could have seen the child in plaintiff's arms, and before plaintiff had rea-

sonable time to get in a position of safety in such car, such employes "caused the said car to suddenly start forward," in consequence whereof she was injured, sufficiently charged a cause of action to be amended by the insertion of the word "negligently."—*Keeton v. St. Louis & M. R. Ry. Co.*, 92 S.W. 512, 116 Mo. App. 281.

**App. 1907.** In an action against a street railway for injuries, a petition alleging that plaintiff, in passing over the floor of the defendant's car, received a severe electric shock through stepping on an electrified plate on the floor of the car, and that the shock was caused by the negligence of the defendant in negligently constructing, maintaining, and operating the car, sufficiently alleged negligence on defendant's part.—*McRae v. Metropolitan St. Ry. Co.*, 102 S.W. 1032, 125 Mo. App. 562.

**App. 1907.** In an action against a carrier for injuries to a passenger, an allegation that defendant, while operating its car at a rapid rate of speed, suddenly and without warning stopped it so as to cause a violent and sudden shock sufficient to throw plaintiff against the car and onto the street, stated a prima facie case of negligence.—*Latimer v. Metropolitan St. Ry. Co.*, 103 S.W. 1102, 126 Mo. App. 70.

**App. 1907.** A petition alleging that defendant allowed the car, controller, motor, and electrical appliances "to become out of order, and allowed the controller \* \* \* to burn out, causing an explosion, setting said car on fire and causing a panic among the passengers, and plaintiff was thrown, pushed, and knocked from the car by the persons frightened \* \* \* striking upon his head," etc., specifically charges negligence.—*Kennedy v. Metropolitan St. Ry. Co.*, 107 S.W. 16, 128 Mo. App. 297.

**App. 1908.** In an action against a carrier for injuries, plaintiff alleged that while passing through the doors of defendant's station, which were opened in the usual manner, "said doors without notice or warning to plaintiff, suddenly closed, and plaintiff was crushed between the same," and that she suffered certain specified injuries. *Held*, that the petition does not state a cause of action, as there is no allegation that the injuries resulted from defendant's negligence, and there is no necessary presumption of negligence from the facts stated.—*Rawson v. Kansas City Elevated Ry. Co.*, 107 S.W. 1101, 129 Mo. App. 613.

**App. 1909.** A petition alleging in general terms that defendant's servants negligently operated the street car on which plaintiff was a passenger, and as a result of such negligence it ran against a wagon in the street and plaintiff was thereby injured, charges general negligence and is sufficient.—*Monday v. St. Joseph Ry. Light, Heat & Power Co.*, 119 S.W. 24, 136 Mo. App. 692.

**App. 1910.** A petition in an action for injuries to a street car passenger that the carmen negligently started the car with a sudden jerk and in such manner as to violently throw the passenger, who had not taken a seat, against the side of a seat, sufficiently charges negligence in the operation of the car without charging that the jerk was an extraordinary or unusual one.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1910.** A complaint charged that defendant's street car which killed deceased was being run 15 miles per hour contrary to defendant's rules, and "that said rate of 15 miles per hour at which rate said car was so struck deceased was moving at that time was an unreasonable, highly dangerous, and negligent rate of speed," and contrary to a city ordinance, etc. *Held* that eliminating the charged violation of the rules and ordinance, sufficient remained to charge common-law negligence.—*Moore v. Metropolitan St. Ry. Co.*, 126 S.W. 181, 142 Mo. App. 290.

**App. 1910.** The petition alleged that, while plaintiff was a passenger on defendant's cable car, the gripman negligently failed to release the cable from the grasp of the grip at a street corner where the cable ran under another cable crossing it, so as to negligently permit the grip to come in contact with appliances under the ground, causing the car to suddenly and violently stop, throwing plaintiff from her seat and injuring her, etc. *Held*, that the petition alleged specific acts of negligence, and not negligence generally, so that only the acts alleged could be relied upon to establish liability.—*Detrich v. Metropolitan St. Ry. Co.*, 127 S.W. 603, 143 Mo. App. 176.

Plaintiff in a street car passenger's action for personal injuries could allege negligence generally by averring that the car, through defendant's negligence, suddenly stopped, throwing plaintiff forward, etc.—*Id.*

**App. 1910.** In an action against a street railroad company for personal injuries to a passenger in a collision between a car and a



metal tower erected in a public square near the track, where the petition alleged that plaintiff became a passenger for hire, that defendant's employes operated the train over the line of railway across the square, and by reason of carelessness and negligence the train left the track and collided with the tower, and plaintiff was injured, etc., it did not attempt to set out specific acts of negligence, but sufficiently alleged general negligence.—*Wolven v. Springfield Traction Co.*, 128 S.W. 512, 143 Mo. App. 643.

**App. 1910.** A petition in an action for injuries to a passenger in consequence of the train colliding with a tree on the track, which alleges generally the existence of the relation of passenger and carrier, and the act of the carrier in permitting a tree to be on its track, and in running its train into it to the passenger's injury, states a cause of action, for the negligence of the carrier arises on proof of the allegations, and, where the allegations are proved, the burden is on the carrier to show its freedom from negligence.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

**App. 1912.** The gist of the negligence alleged in a petition in an action for injuries to a passenger while boarding a car, averring that the operators of the car negligently started the car while the passenger was in the act of boarding the car, that the operators saw, or by ordinary care could have seen, the passenger in a position of danger, attempting to board the car, in time to have refrained from starting the car until she had boarded it, etc., is in starting the car before the passenger had reached a place of safety, and thereby putting her in a position of danger when it was the duty of the operators of the car not to start it until she had been given a reasonable opportunity to reach a place of comparative safety.—*Conway v. Metropolitan St. Ry. Co.*, 142 S.W. 1101, 161 Mo. App. 81.

**App. 1913.** A petition in street car passenger's action for injuries, alleging that the jerk by which she was thrown to the ground was the result of suddenly and negligently starting the car, sufficiently pleads the specific act of negligence which caused the jerk.—*Bobbitt v. United Rys. Co. of St. Louis*, 153 S.W. 70, 169 Mo. App. 424.

**App. 1913.** The petition, in a street car passenger's action for personal injuries, held by its direct allegations to aver negligence in suddenly and violently starting the car while plaintiff was boarding and while it was in a

position making it dangerous to start it.—*Fields v. Metropolitan St. Ry. Co.*, 155 S.W. 845, 169 Mo. App. 624.

**App. 1914.** If the relation of carrier and passenger is shown to exist when the injury is received, in a derailment, the petition need only allege that the car was derailed by the carrier's negligence, and that plaintiff was injured thereby; the burden being on the carrier to show that it was not negligent.—*Patterson v. Springfield Traction Co.*, 163 S.W. 935, 178 Mo. App. 250.

**App. 1916.** A petition in an action by a customer of an establishment injured in entering an elevator held general in its averments so as to permit recovery on the doctrine of *res ipsa loquitur*.—*Anderson v. American Sash & Door Co.*, 182 S.W. 819.

**App. 1919.** Allegations that plaintiff passenger was injured by a cinder from a passing locomotive hitting his eye, due to defendant's negligence, etc., held to plead negligence generally, and not specifically.—*Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

**App. 1920.** Petition of one who having alighted from defendant's train on which he was a passenger, in walking on the path from the depot to town, slipped into an unguarded hole beside it on defendant's premises held to charge negligence as to the unguarded hole; averments as to ownership, construction, and maintenance of the path, if not surplusage, being as to another ground of negligence.—*Kaenter v. Missouri Pac. Ry. Co.*, 218 S.W. 349.

**App. 1920.** A petition in an action against a street railway, averring that defendant negligently permitted and allowed the car to move with a sudden and unexpected jerk, thereby pulling or driving the car forward with such force as to throw some one in the inside of the car against the glass entrance door, breaking the glass therein and causing the same to strike plaintiff in the eyes and face, held to sufficiently allege that the jerk or lurch was unusual and extraordinary, and not one of the ordinary jerks or lurches which is incident to the operation of a car, especially on an attack after verdict.—*Laycock v. United Rys. Co. of St. Louis*, 227 S.W. 883, certified questions answered (Sup. 1919) 235 S.W. 91.

**App. 1920.** A petition in an action by passenger for injuries alleging that "plain-

tiff further says that said collision and the injuries she received hereinafter set out were caused by carelessness and negligence of the defendants, \* \* \* their servants, agents, and employees operating said street car," *held* to contain a general charge of negligence, and not a specific charge.—*Bergfeld v. Dunham*, 228 S.W. 891.

←314 (3). Violation of statute or ordinance.

*See explanation, page iii.*

←314 (4). Acts of employés, fellow passengers, and other third persons.

**Sup. 1882.** Where, in an action against a railway company to recover for the death of a passenger, the petition alleged that the servants in charge of the train were negligent in operating it, the allegation was sufficient to cover the conduct of the engineer in charge of the train in the management of the train at the time of the accident.—*Ellet v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 518.

**Sup. 1920.** In order to allege specific negligence, as to a street car passenger, there must not only be an averment as to the particular servants whose negligence is complained of, but it must also be pointed out wherein they or either of them have been negligent.—*Bergfeld v. Kansas City Rys. Co.*, 227 S.W. 106, 285 Mo. 654.

**Sup. 1922.** The more direct and positive allegations of a petition *held* to count, not on the ejection of a passenger, but on an assault by a conductor, so that allegations that plaintiff intended to pay his fare were properly rejected as surplusage.—*State ex rel. United Rys. Co. of St. Louis v. Allen*, 240 S.W. 117.

**App. 1886.** The petition in an action for the death of plaintiff's minor son stated that the servants of defendant railroad company in charge of a freight train took and received the boy on the train for a ride, and that while the boy was on the train he was killed, owing to the negligence of those in charge thereof. *Held* that, inasmuch as the petition failed to allege any authority, express or implied, on the part of defendant's servants in charge of the freight train to carry passengers, and as it was not alleged that the train was a passenger train, the petition failed to state a cause of action.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 22 Mo. App. 60.

**App. 1889.** In an action against a railroad company for injuries to a passenger caused by his being negligently directed to get off from a train at a certain point by the

conductor or some other employé, it was not necessary for the petition to allege that such other employé was authorized by the railroad company to give such directions.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 36 Mo. App. 203.

**App. 1901.** In an action for personal injuries, a declaration which alleges that the train on which plaintiff was riding, by the carelessness, negligence, and wrongful acts and conduct of defendant, its agents, servants, and employés, was, without fault, negligence, or want of care on plaintiff's part, struck by another train and engine on defendant's road, and the two trains were then and there and thereby, without fault or negligence on the part of plaintiff, but by reason of the carelessness, negligence, and want of proper care on the part of defendant, its agents, servants, and employés, collided, and that plaintiff by reason of said collision was permanently injured, etc., sufficiently alleges defendant's negligence.—*Shuler v. Omaha, K. C. & E. Ry. Co.*, 87 Mo. App. 618.

**App. 1920.** A petition against a street railway company for personal injuries from assault by defendant's employé, stating that the latter "in the course of his employment and acting in the line of his duty," struck plaintiff, etc., but further setting out all the facts, where the parties were, and the business being transacted, and showing the servant was attending to the master's business and that in the course of the same the injury occurred, *held* sufficient as against objections that it stated a mere conclusion.—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo. App. 262.

←314 (5). Setting down passengers.

**Sup. 1899.** Rev. St. 1889, § 2074, requires that in construing a pleading to determine its effect its allegations shall be liberally construed with a view to substantial justice. A petition alleged that a passenger on a street car requested the conductor to let her off at a certain street; that on reaching there, it appeared that the car was not going to stop, and the passenger again indicated to the conductor her wish to get off there; that immediately, as if in response to her request, the car slowed down, until its motion was scarcely perceptible, when she attempted to alight; and that while doing so the car started suddenly, and she was thrown down. *Held*, after verdict, that it did not charge that the passenger specially requested to be let off at an unusual place, but it implied that the car was stopped at her request, and that the con-

ductor saw, or should have seen, her alighting; so that it was unnecessary to allege that the car started before she had time to alight.—*Cobb v. Landell Rty. Co.*, 50 S.W. 310, 149 Mo. 135.

**Sup. 1925.** Allegations in passenger's action for injuries *held* to state a cause of action.—*Rosenzweig v. Wells*, 273 S.W. 1071, 308 Mo. 617.

**App. 1902.** A petition alleged that a passenger on a street car, as it approached a regular stopping place, notified the conductor of his wish to alight; that, in sight of the conductor, he stepped upon the lower step of the platform; that the car slackened speed, but did not stop, and immediately after passing the crossing the employes "carelessly and negligently suddenly increased its speed without giving plaintiff warning"; and that thereby plaintiff was thrown to the ground, etc. *Held*, that the petition sufficiently pleaded the negligence of the company.—*Gorman v. St. Louis Transit Co.*, 70 S.W. 731, 96 Mo. App. 602.

**App. 1903.** A passenger alleged that the defendant company operated an electric line through a country district; that the car she was on was an open one; that at a regular station defendant maintained an elevated wooden platform; that plaintiff notified the conductor of her desire to alight at this station, and that it was the duty of the carmen to stop opposite the platform, but they carelessly ran the car beyond that, and stopped where the ground was three or four feet below the running board and the surface was rough; that when the car stopped the conductor carelessly called the name of the station, and waited for plaintiff to alight, without offering to assist her; and that in attempting to step carefully onto the ground, by reason of the great distance and the uneven surface, she fell and was injured. *Held*, that the petition stated a cause of action, though it was not expressly averred that the place where the car stopped was unsafe or dangerous.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

**App. 1904.** A petition alleging that plaintiff was a passenger on a street car, and signaled to stop the car, and that while the car was stopped in pursuance to her signal and plaintiff was alighting defendant's servants negligently caused the car to be started forward with a sudden jerk, causing plaintiff to fall, etc., was sufficient after verdict, although it did not allege in express terms that the car did not stop a reasonable time to al-

low plaintiff to alight, or that the conductor knew or should have known that plaintiff was getting off.—*McKinstry v. St. Louis Transit Co.*, 82 S.W. 1108, 108 Mo. App. 12.

**App. 1905.** Where, in an action for injuries to a passenger on a street car, her evidence showed that she got a transfer from the motorman, and that passengers sometimes boarded the cars to which plaintiff was transferred at the point where she attempted to alight, and the motorman testified that passengers got on and off defendant's cars at such junction, and that before starting his car he looked around to see if any one was getting on or off, and plaintiff alleged that the motorman negligently and carelessly turned on the electricity as she was attempting to alight, causing the car to suddenly jerk and start forward, throwing her to the pavement, such evidence sufficiently disclosed a duty of the motorman to exercise due care to see that passengers had alighted in safety before he started the car; and the petition was therefore sufficient to support a verdict for plaintiff, though it did not allege that she informed the motorman of her intention to alight.—*Cramer v. Springfield Traction Co.*, 87 S.W. 24, 112 Mo. App. 350.

**App. 1907.** An allegation, in the petition in an action against a street railway company for injuries to a passenger while alighting from a car in consequence of the sudden starting thereof, that when the car, on arriving at a crossing, for passengers to alight, was stopped, or caused to be run so slow as to be almost stopped, is a matter of inducement, and the negligence consists in the sudden starting of the car.—*Glio v. Metropolitan St. Ry. Co.*, 103 S.W. 142, 125 Mo. App. 710.

**App. 1908.** A petition in an action for injuries to a passenger while alighting from a moving car which alleges that the conductor promised to let him off at a designated point, that the speed of the car was checked as it approached the point inducing the passenger to believe that the conductor was about to stop the car, and that the passenger was in the act of alighting when the car was started at an accelerated speed, throwing him from the car, charges every negligent act on the part of the conductor as to stopping and starting the car at that point.—*Moeller v. United Rys. Co. of St. Louis*, 112 S.W. 714, 133 Mo. App. 68.

**App. 1910.** Plaintiff alleged that she was a passenger on defendant's train, and that after it stopped at her station, while she was

attempting to alight in the exercise of ordinary care, and before she had fully left the train and had a reasonable time to alight safely therefrom, defendant, before the train had stopped a sufficient length of time to enable plaintiff using due diligence to alight, caused the train to be started forward with a violent and sudden jerk without knowledge or warning to plaintiff, causing her to be thrown to the gravel and clnder platform at the station, and by reason of the sudden and violent jerking and forward movement of the train plaintiff was struck on the head and body by the moving car and injured. *Held*, that defendant's failure to hold the train a sufficient length of time to permit plaintiff to alight therefrom was the gravamen of the charge, and that the allegation that the train was moved forward with a sudden jerk, etc., was surplusage.—*Kirby v. St. Louis & S. F. R. Co.*, 130 S.W. 69, 146 Mo. App. 304.

**App. 1918.** Petition for injury to passenger falling in alighting from street car *held* to charge two acts of negligence, concurrent causes of injury, sudden starting, and stopping opposite hole.—*Hoffman v. Dunham*, 202 S.W. 429.

**App. 1922.** A petition alleging that while plaintiff, about to leave defendant's street car, was standing on the rear step, defendant negligently caused the step to be raised and the rear doors to be closed, thereby causing plaintiff to fall, *held* to state a cause of action without regard to additional allegation that defendant closed the doors of the car on plaintiff's clothing, and negligently started the car, dragging plaintiff along the street.—*McDermott v. United Rys. Co. of St. Louis*, 236 S.W. 1080.

**App. 1926.** Petition in action against street railroad for injuries to plaintiff's wife when alighting from car *held* to plead general negligence, making doctrine of *res ipsa loquitur* applicable.—*Lammert v. Wells*, 282 S.W. 487.

**App. 1926.** Petition alleging that defendant negligently opened rear door of street car, and suddenly checked speed, causing passenger to be thrown from car to street, stated cause of action.—*Goodwin v. Wells*, 285 S.W. 112, 220 Mo. App. 1.

#### —314 (6). Negating contributory negligence.

**App. 1911.** In an action against a carrier for injuries from defects in a station platform, the allegations of the petition *held* not to justify an inference that plaintiff was

guilty of contributory negligence.—*Munro v. St. Louis & S. F. R. Co.*, 135 S.W. 1016, 155 Mo. App. 710.

**App. 1912.** A street car passenger, injured in alighting, was not bound to negative contributory negligence.—*Harmon v. United Rys. Co. of St. Louis*, 143 S.W. 1114, 163 Mo. App. 442.

#### —314 (7). Averments as to proximate cause.

**Sup. 1921.** To have causal or actionable negligence, the petition in an action by a passenger for personal injuries must charge that the alleged negligent act occasioned the injury, and, if there are two or more alleged negligent acts, the petition must connect each as a cause of the injury, or state that all combined caused it.—*Crone v. United Rys. Co. of St. Louis*, 236 S.W. 654.

**App. 1911.** The petition in a street car passenger's action for personal injuries alleged that the conductor signaled the motorman as the car approached a street, and that it had come to a position of rest to discharge passengers, and while plaintiff was alighting, she using due care and diligence, and before she had a reasonable time to alight, the car was carelessly and negligently started forward, throwing plaintiff violently into the street, "which said negligence directly contributed to cause plaintiff's injuries, and by reason of which" she was injured as described, and the petition further alleged the negligent violation of an ordinance requiring motormen on west-bound cars to bring the car to a full stop at the corner on the west side of intersecting streets whenever signaled by the conductor, and requiring the cars to remain stationary long enough to allow passengers to safely alight, which negligence directly contributed to cause plaintiff's injuries. *Held*, that the petition was not defective, in that it alleged that each negligent act averred contributed to the accident, as the petition need not allege which was the direct or sole cause of the injury in order to make defendant liable.—*Parker v. United Rys. Co.*, of St. Louis, 133 S.W. 137, 154 Mo. App. 126.

**App. 1927.** Petition by injured passenger, based on rule of *res ipsa loquitur*, must allege carrier's negligence caused injury.—*Curry v. St. Louis-San Francisco Ry. Co.*, 296 S.W. 473, 221 Mo. App. 1.

#### —314 (8). Plea or answer.

**Sup. 1914.** A carrier which, when sued by a passenger riding on a pass for injuries

while alighting, pleads the common law of the state within which the passenger took passage and the state within which the accident occurred, and the statutory law of the states and a general denial, sufficiently pleads rights under the federal statutes.—*Wentz v. Chicago, B. & Q. R. Co.*, 168 S.W. 1160, 250 Mo. 450, Ann. Cas. 1916B, 317.

**Sup. 1914.** In an action by a shipper of live stock injured while riding in the freight car instead of the caboose, waiver of the provision of the contract, whereby the railroad company required him to ride in the caboose, must be pleaded.—*Scrivner v. Missouri Pac. Ry. Co.*, 169 S.W. 83, 260 Mo. 421.

315. — Issues, proof, and variance.

315 (1). Issues raised by and evidence admissible under pleadings.

**Sup. 1882.** In an action against a railroad company, based on defendant's negligence in running its trains over a portion of its road rendered dangerous by reason of having been undermined by a flood of water, it appeared from the evidence that the rain-storm on the night of the disaster was wholly unprecedented in violence, and the quantity of water which fell during its continuance was on that account of such a character that defendant, in construction of its roadbed, was not required to anticipate or provide against it. *Held*, that the evidence to the effect that, after the accident, a new pile bridge had been built where the old one was, was not proper to be taken into consideration by the jury, and therefore, such evidence having been received, instructions should have been given telling the jury not to consider it.—*Ely v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 34.

**Sup. 1901.** Where, in an action against a railroad company for injury to a person riding on a freight train, defendant claimed that plaintiff was not entitled to the care due a passenger, for the reason that plaintiff was illegally traveling on a mileage ticket issued to another, and not transferable, and on such contention plaintiff dismissed as to the count in his complaint in which he sought to recover as a passenger, and the case was submitted to the jury on the theory that plaintiff was a trespasser, defendant could not contend that it was not liable because of a release contained in such mileage ticket exempting it from liability for injuries sustained by the holder while riding on a freight train.—*Merrilees v. Wabash R. Co.*, 63 S.W. 718, 103 Mo. 470.

Where an action for injuries to a person riding on a freight train was dismissed as to a count basing his right on the theory that he was a passenger, and the case was submitted on instructions asked by both plaintiff and defendant, which declared that the plaintiff was a trespasser, a defense that defendant was not liable, because of plaintiff's fraud in representing himself to be the owner of a mileage ticket issued to another, which he induced the conductor to accept in payment of his fare, was thereby eliminated from the case.—*Id.*

**Sup. 1905.** Where, in an action for injuries to a passenger on a street car in a collision with a railroad train, defendant undertook to show that the negligence of the railroad company was the sole cause of the accident, it was not necessary that defendant should plead a city ordinance regulating the speed of steam railroad trains claimed to have been violated by the railroad company at the time of the accident, in order to authorize the admission of such ordinance in evidence.—*Bragg v. Metropolitan St. Ry. Co.*, 91 S.W. 527, 192 Mo. 331.

**Sup. 1908.** Where recovery is sought on the ground of specific negligence, alleged in the petition, that defendant so carelessly and negligently operated its cars that the car in which plaintiff was riding was caused to collide with another car of defendant, the court should limit the consideration of the jury to such specific negligence.—*Davidson v. St. Louis Transit Co.*, 109 S.W. 583, 211 Mo. 320.

**Sup. 1908.** If a petition, in an action by a passenger for injuries, charges negligence in general terms, then proof of negligence either in relation to the tracks or roadbed would make out a prima facie case for plaintiff; but, when the petition alleges specific acts of negligence, there is no right to prove other acts, and the allegations of specific acts of negligence cannot be treated as surplusage.—*Kirkpatrick v. Metropolitan St. Rty. Co.*, 109 S.W. 682, 211 Mo. 68.

**Sup. 1908.** While plaintiff may make a prima facie case by merely alleging and proving that he was a passenger, that a collision occurred, and that he was injured in consequence thereof, when he alleges that he was injured because the servants of defendant transit company so negligently managed the car on which he was a passenger and so negligently maintained it and the machinery, appliances, brakes, and running gear thereof as to cause the car to be collided with by the

engine and cars of the defendant railway company upon a crossing, he relies on specific acts of negligence, and cannot recover on the ground that the company failed to exercise the highest practicable degree of care, such as would be exercised by very careful and skillful employes under the circumstances.—*Beave v. St. Louis Transit Co.*, 111 S.W. 52, 212 Mo. 331.

**Sup. 1914.** In an action by one injured while riding in a freight car, evidence that he was there riding to protect his property *held* inadmissible under the reply.—*Scrivner v. Missouri Pac. Ry. Co.*, 169 S.W. 83, 260 Mo. 421.

**Sup. 1915.** Under petition charging a specific act of negligence, *held*, that plaintiff must stand or fall on such specific charges.—*Northam v. United Rys. Co. of St. Louis*, 176 S.W. 227.

**Sup. 1920.** In an action for personal injuries to a seven year old boy when alighting from defendant's moving street car, based on the humanitarian doctrine, evidence that the motorman ordered the boy off the car was admissible to prove the motorman's knowledge of the boy's presence, and such evidence does not render the decision for plaintiff objectionable as permitting a recovery on a matter not pleaded.—*State ex rel. Metropolitan St. R. Co. v. Ellilison*, 224 S.W. 820, quashing certiorari (App. 1919) *Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 106.

**Sup. 1921.** Under averment of pleading that it was the custom of the motorman not to accelerate speed till receiving a go ahead signal from the conductor, the character of the signal as two bells may be shown.—*Chapman v. Kansas City Rys. Co.*, 233 S.W. 177.

**Sup. 1922.** In action for injury, in that defendant negligently caused and permitted the doors of a street car to partially close and the step to be raised, thereby throwing her forward and against the platform and catching her left limb between the steps and side of the car, testimony that the car moved four or five feet while plaintiff was in such position was not admissible as a ground of negligence.—*Maloney v. United Rys. Co. of St. Louis*, 237 S.W. 509.

**Sup. 1925.** Allegations in passenger's action for injuries *held* to state a cause of action and to let in proof that car was stopped in an "unusual" manner.—*Rosenzweig v. Wells*, 273 S.W. 1071, 308 Mo. 617.

**App. 1878.** In an action for injuries to a passenger on a street car, where the petition charged negligence of the agents and employes of defendant in operating its cars, evidence of the condition of defendant's track was inadmissible.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App. 1892.** A passenger, suing for injuries, must recover on the acts of negligence alleged in his petition.—*Madden v. Missouri Pac. Ry. Co.*, 50 Mo. App. 606.

**App. 1900.** In an action to recover damages for personal injuries caused by suddenly starting the car which plaintiff was attempting to board, it is error to admit evidence relating to the construction of the step of the car, where the petition does not count on negligence of that kind.—*Hansberger v. Sedalia Electric Ry., Light & Power Co.*, 82 Mo. App. 566.

**App. 1906.** In an action for an injury to plaintiff while a passenger on defendant's train which was wrecked, where the petition alleged that the negligence consisted in keeping and maintaining an unsafe and dangerous roadbed and track, and in negligent operation of the train, such charges of negligence, though general, entitled plaintiff to show any specific negligence which made the track dangerous or anything which established a negligent operation of the train.—*Mefford v. Missouri, K. & T. Ry. Co.*, 97 S.W. 602, 121 Mo. App. 647.

**App. 1907.** Where, in an action for injuries to a street car passenger by a defect in the floor, the petition charged that the floor was rotten, worn, loose, and unfit for use, plaintiff was not confined to proving the defect of rottenness, but the petition was sustained by evidence that the floor was loose and unsafe.—*Jorden v. St. Louis & M. R. R. Co.*, 99 S.W. 492, 122 Mo. App. 330.

**App. 1907.** In an action for injury to a passenger while alighting from a street car, plaintiff's omission to plead that the car stopped at a regular station did not restrict proof to a stop at a point other than a regular stopping place.—*Murphy v. Metropolitan St. Ry. Co.*, 102 S.W. 64, 125 Mo. App. 269.

**App. 1908.** A petition stating a contract of carriage, and showing that plaintiff was injured by the negligence of defendant's servants in starting its street car as she was alighting, when liberally construed in the interests of justice as required by Rev. St. 1809, § 629 (Ann. St. 1906, p. 652), states a cause of

action sounding in tort rather than contract, although it alleges an express contract as an inducement, the gist of the action being defendant's breach of its public duty, and therefore evidence of an express contract is not material to the issue, and proof of an implied contract creating the relation of carrier and passenger is sufficient to sustain it.—*Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88, 134 Mo. App. 282.

**App. 1909.** Where, in an action for injuries to a passenger by the premature starting of a street car, plaintiff's petition did not aver that a signal was given to stop the car on the west side of a cross-street, or that that was the regular stopping place, but only charged that plaintiff signaled the operating servants to stop the car at the intersection of certain streets, "a regular stopping place for the discharge of passengers," and that the car stopped there, plaintiff was not committed to the theory that the west side of the street intersection was the regular stopping place for the discharge of east bound passengers, nor was she required to prove the same.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084, 142 Mo. App. 718.

**App. 1910.** Where a petition for damages for an assault by a street car conductor alleges that, as a result of the injury on the head, plaintiff suffered mental derangement, an expert witness may testify that plaintiff's disposition was changed, since a derangement of the mind would necessarily have some effect on the disposition of the person.—*Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402.

**App. 1910.** Where a passenger is injured either through defective appliances or negligence of the carrier's servants, a general allegation of negligence is sufficient to support proof, but, if the negligence is specified, it should be proven as alleged.—*Ingles v. Metropolitan St. Ry. Co.*, 129 S.W. 493, 145 Mo. App. 241.

**App. 1910.** Where, in an action for injuries to a passenger in consequence of the train colliding with a tree on the track, the carrier, after the passenger's prima facie case made by invoking the presumption of negligence, sought to show that the tree recently fell on the track and that it came there without any negligence on its part, the passenger in rebuttal could show the carrier's negligence in permitting the tree to stand beside the right of way, because the tree was a menace on account of its decayed and burned

condition, though the petition merely alleged generally the negligence of the carrier in permitting the tree to remain on the track, and in negligently running the train into it.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

**App. 1911.** Where the petition in a husband's action against a carrier for injuries to his wife alleged that the wife without her fault, but through the negligence of defendant's servants in charge of its roadbed and track, and in charge of the train on which the wife was riding, seriously and permanently injured her, etc., such general allegations of negligence were sufficient to authorize evidence that defendant's roadbed and track at the point of the derailment of the train were defective, and also that the train was operated at a negligent speed on such track.—*Tate v. Wabash R. Co.*, 141 S.W. 459, 159 Mo. App. 475.

**App. 1911.** Where the petition alleged that plaintiff was a passenger, and was thrown upon the streets through the negligence of the carrier's servants by starting up the car with a sudden jerk as she was preparing to alight, such averments are not allegations that the car had come to a stop and was then started, and it could be shown that the starting with a rapid jerk was after the car had slowed down as if to stop.—*Anderson v. Metropolitan St. Ry. Co.*, 141 S.W. 461, 159 Mo. App. 449.

**App. 1913.** Allegations that defendant's servant in charge of the car in which plaintiff was a passenger negligently caused the car to be struck by and collide with a railroad engine were general in their nature, so that the doctrine of *res ipsa loquitur* was available.—*Nagel v. United Rys. Co. of St. Louis*, 152 S.W. 621, 169 Mo. App. 284.

**App. 1913.** Under an allegation in a petition for a passenger's wrongful death that the railroad company permitted its roadbed and track to become unsafe, evidence is not admissible to show that the wreck occurred by mistake of the train dispatcher or a defect in the locomotive.—*Williams v. Chicago, B. & Q. Ry. Co.*, 155 S.W. 64, 169 Mo. App. 468.

**App. 1914.** A petition, alleging that the street car on which plaintiff was a passenger jumped the track by reason of the negligence of defendant and its employes, and plaintiff was thereby violently thrown from her seat and injured, charged general and not specific

negligence, so that plaintiff was not limited to proof of negligence in operating the car.—*Patterson v. Springfield Traction Co.*, 163 S. W. 955, 178 Mo. App. 250.

**App. 1915.** Evidence that passengers were customarily received on caboose of freight train wherever it stopped *held* properly admitted, although petition did not specifically invoke such custom.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

**App. 1918.** Plaintiff, seeking recovery on ground that she was jerked off defendant's train, must make out a case on that theory.—*Rooker v. Deering, Southwestern Ry. Co.*, 204 S.W. 556.

**App. 1918.** Petition alleging that while deceased was in the act of alighting the street car was negligently started was sufficiently broad to warrant submission of issue whether the conductor allowed deceased a reasonable time safely to alight.—*Teske v. Kansas City Rys. Co.*, 204 S.W. 577.

**App. 1920.** Where the complaint stated that the trainmen negligently permitted greatly intoxicated persons, who had intoxicating liquors in their possession and were using loud, offensive, and indecent language, to enter the coach, plaintiff might testify that she was injured by having another person shoved against her by the intoxicated persons, as against a claim that the plaintiff failed to allege that the trainmen knew facts which would lead them to believe that she was about to be injured.—*Abernathy v. Missouri Pac. R. Co.*, 217 S.W. 568.

**App. 1920.** A contract whereby a street railroad company operated interurban cars within the city and the ordinance authorizing such contract are not admissible, where the petition against both interurban and street railroad company simply pleaded that plaintiff was a passenger in an interurban car, and was injured by the negligence of the servants of defendants then operating the car.—*Huntington v. Kansas City Rys. Co.*, 220 S. W. 1011.

**App. 1920.** Where petition for damages for injuries received while boarding a street car alleged that the car was suddenly started "and" the vestibule door was negligently closed, the two acts of negligence were separate and distinct, and the use of "and" between them did not make them a single and undivided or indivisible act; hence plaintiff could submit his case and recover on both

or either of them.—*Vogts v. Kansas City Rys. Co.*, 228 S.W. 526.

**App. 1921.** In an action for negligence in causing a street car to start while a passenger was alighting, in which it was claimed by defendant that the way plaintiff said she fell was contrary to physical laws, testimony that the car started with a jerk was admissible, though the starting of the car with a jerk was not pleaded; such testimony being material as evidential matter.—*Hartweg v. Kansas City Rys. Co.*, 231 S.W. 269.

**App. 1922.** Where a petition, alleging the relation of passenger and carrier, alleged also that plaintiff was assaulted by defendant's servant while a passenger on defendant's car, the fact that it also alleged that the servant was acting within the scope of his employment could not deprive the passenger of the right to recover as for a breach of defendant's duty as a common carrier.—*Buttler v. Wells*, 241 S.W. 664.

**App. 1922.** An allegation in a petition for injuries to a passenger that a designated servant of defendant was negligent is a general, and not a specific, allegation of negligence, but nevertheless confines the proof of the negligence of the servant referred to.—*Perkins v. United Rys. Co. of St. Louis*, 243 S. W. 224.

**App. 1923.** Evidence that street car door was open when plaintiff attempted to board car and that company's rules required conductor to close it before starting was admissible on issue whether car was standing or moving, though negligence in starting without closing door was not pleaded, and such rule was for guidance of company's employes.—*Detchemendy v. Wells*, 253 S.W. 150.

**App. 1924.** In action for injuries, alleged to have been caused by negligent operation of street car past station building, by which operatives knew or should have known that passengers on footboard were likely to be struck, admission of testimony as to speed and swaying of car as it passed building, to show manner in which injury occurred, *held* not error as tending to raise assignment of negligence not pleaded.—*Van Leer v. Wells*, 263 S.W. 493.

**App. 1925.** Plaintiff, pleading specific acts of negligence in constructing and maintaining trestle, may not invoke doctrine of *res ipsa loquitur* to make out case.—*Mayfield v. St. Louis-San Francisco Ry. Co.*, 272 S.W. 1051.



**App. 1925.** Passenger alleging certain specific acts of negligence precluded from recovery on others.—*Crabtree v. St. Louis & S. F. R. Co.*, 273 S.W. 1104, 218 Mo. App. 308.

**App. 1926.** Plaintiff, in action against street railroad for injuries to his wife as passenger, might rely on presumptive negligence, where he pleaded general negligence.—*Lammert v. Wells*, 282 S.W. 487.

315 (2). **Matters admissible under general denial.**

**Sup. 1882.** Where, in an action against a railroad company to recover for the death of a passenger, the petition alleged that the servants in charge of the train on which decedent was a passenger were negligent in operating the train, thereby causing the train to be carried down an embankment, the company could show, under the general denial, that the casualty was the consequence of an extraordinary rain storm.—*Ellet v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 518.

Where, in an action against a railroad company to recover for the death of a passenger, the petition alleged that the servants in charge of the train on which decedent was a passenger were negligent in operating the train, thereby causing the train to be carried down an embankment, the company could show, under the general denial, that the casualty was the consequence of an extraordinary rain storm.—*Id.*

**Sup. 1903.** In an action for injuries to one accompanying live stock on a freight train while in the car with the stock, on account of the alleged negligence of the company's servants in permitting another car to bump into it with great force, a provision in the contract of shipment requiring plaintiff to ride in the caboose, if a defense to the action, is admissible under the general denial.—*Bolton v. Missouri Pac. Ry. Co.*, 72 S.W. 530, 172 Mo. 92.

315 (3). **Matters to be proved.**

**Sup. 1901.** Where a petition for injuries to a passenger on a street car merely charged that the accident was caused by defendant's negligence, defendant is not required to prove what caused the train to get beyond his control.—*Feary v. Metropolitan St. Ry. Co.*, 62 S.W. 452, 162 Mo. 75.

Where plaintiff, suing for injuries received in a street-car accident, limited his right to recover to a specific act of negligence of defendant, he could not avail him-

self of the general rule that a passenger is only obliged to allege generally and prove the relation of passenger and carrier and the injury, to make out a *prima facie* case, and that the burden then shifts to the carrier to exonerate himself.—*Id.*

**Sup. 1903.** In an action for personal injuries sustained in a railway collision, the negligence charged was that defendant "did, by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide." *Held*, that the rule that if, instead of pleading generally the relation of carrier and passenger, and the injury, and thus making out a *prima facie* case, plaintiff limits his right to recover to a specific act of negligence, he must prove such specific negligence, did not apply, and it was not necessary for plaintiff to show which servant so in charge of the cars was negligent.—*Malloy v. St. Louis & S. Ry. Co.*, 73 S.W. 159, 173 Mo. 75.

**Sup. 1903.** The negligence charged by a petition in an action for injury to a passenger by derailment of a street car, alleging that the "running gear, that is to say, the wheels, axles, and other machinery, by means of which the said car ran along the said track, were defective and out of order, and unfit for the purpose of supporting the said car on the said track," and that though defendant knew, or should by the exercise of ordinary care have known, of such defective running gear, it "ran the said car along the said track, and into said curve at a high rate of speed," was general and not specific negligence, so that there was no failure of proof by want of evidence of defect in the running gear of the car.—*Johnson v. St. Louis & S. Ry. Co.*, 73 S.W. 173, 173 Mo. 307.

**Sup. 1907.** In an action for injuries to a passenger, where the petition contains a general allegation of negligence, and alleges specifically the failure of the defendant's employes to stop a train before beginning the descent of an incline where the accident occurred, in not providing suitable means nor exercising reasonable care in the use of those furnished, in the failure of the employes to be at their proper posts of duty, and in causing one train to follow another down the incline, there is no presumption of negligence from the accident, but the specific allegations must be proved.—*Roscoe v. Metropolitan St. Ry. Co.*, 101 S.W. 32, 202 Mo. 576.

**Sup. 1908.** The petition, which, after alleging that deceased was a passenger on de-

fendant's street car, and the stopping of the car to allow him to alight, states, "but while he was in the act of passing to the steps \* \* \* to alight, \* \* \* and before he had reasonable time or opportunity to alight, \* \* \* defendants, unmindful of their agreement with him [meaning the implied agreement to safely carry and give a reasonable time and opportunity to alight from the car raised by the relationship pleaded] and of their duty in the premises [which duty likewise contemplated the same things], did by their servants in charge of and managing said car negligently cause and permit said car to suddenly, and without warning, start and go forward with a sudden motion for a few feet, and then stop with a sudden shock and jerk," whereby he was thrown—charges a failure of defendant's duty to stop the car for such reasonable time as was required to allow deceased to alight in safety, and what is said as to starting the car and afterwards stopping it is but descriptive of the method and manner by which the failure to stop for a reasonable time occurred, without which the petition would have stated a cause of action; so that proof of the negligent starting, and the resulting injury, without proof of the negligent stopping, authorizes a recovery.—*Millar v. St. Louis Transit Co.*, 114 S.W. 945, 215 Mo. 607.

**Sup. 1909.** In an action for injuries from a carrier's negligence if negligence is charged in general terms, plaintiff need only show that defendant was a common carrier and that plaintiff was a passenger and injured by the carrier while being carried, but if the petition charges specific negligence the acts charged must be proven as alleged before a prima facie case is made.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1919.** Where the petition of a passenger on defendant's train averred that a vestibule door was negligently left open, and that as a result of a sudden jar or jolt he was thrown from the car platform onto the tracks, proof of the concurring acts of negligence is essential to recovery.—*Giles v. Michigan Cent. R. Co.*, 212 S.W. 873, 278 Mo. 350.

**Sup. 1921.** A petition alleging that deceased was killed by the negligence of defendant's servant in suddenly starting or permitting a freight elevator to start up, while deceased was placing machinery on it, without warning, when the operator knew or by exercising ordinary care could have known deceased was in a dangerous position, charged

specific negligence, thus preventing the application of the doctrine of *res ipsa loquitur*.—*Grimm v. Globe Printing Co.*, 232 S.W. 676.

**Sup. 1927.** Allegations of reply in passenger's action against railroad for injuries, if construed to deny engineer's negligence, held not to relieve railroad from showing absence of other negligence.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**App. 1905.** Where there was evidence that defendants' employé carelessly closed the door of an elevator on plaintiff's dress, and at the same moment started the elevator, and negligence in that respect was well pleaded, it was not error to refuse to direct a verdict for defendants, in that there was a total failure of proof, though some of the grounds of negligence alleged were not proved.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**App. 1905.** Where a petition against a carrier for injuries to a passenger unnecessarily alleges the specific acts of negligence complained of, plaintiff assumes the burden of proving the acts alleged, and must recover, if at all, on the negligence pleaded.—*Hamilton v. Metropolitan St. Ry. Co.*, 89 S.W. 893, 114 Mo. App. 504.

**App. 1906.** A petition in an action against a street railway company for injuries to a passenger which alleges that the company neglected to stop the car a sufficient length of time for the passenger to board it, whereby she was injured in consequence of the sudden starting of the car as she had one foot on the lower step of the car and held on to a handhold, and that the company, by the exercise of ordinary care, could have seen her hanging by the handhold and could have stopped the car by the exercise of ordinary care in time to have avoided injuring her, sets forth two causes of action, one for starting the car while the passenger was attempting to get aboard, and one for negligence in failing to stop the car after the discovery of her peril, and on proof of either the passenger was entitled to recovery.—*Foland v. Southwestern Missouri Electric Ry. Co.*, 95 S.W. 958, 119 Mo. App. 284.

**App. 1907.** A petition in an action against a street railroad company for injuries to a passenger charged that defendant negligently allowed the car and appliances to become out of order, so as to cause such an explosion as caused a panic among the passengers, whereby they threw, pushed, or knocked plaintiff off the car. Plaintiff testified: "This flash struck me in the face, and

I don't know, the current or something, must have carried me off the car. I don't know how I got off, whether I jumped off or that knocked me off; didn't know anything," etc. *Held*, that plaintiff's evidence failed to show that the explosion caused the panic, and the knocking him off the car by the other passengers, and amounted to a failure to sustain the petition.—*Kennedy v. Metropolitan St. Rty. Co.*, 107 S.W. 10, 128 Mo. App. 297.

**App. 1908.** Plaintiff alleged that, as he was entering a grip car, the motorman suddenly and negligently started the car with a quick motion, throwing plaintiff out of the approach to the seat, so that his body projected out beyond the side of the car, and that thereupon plaintiff was struck by a car, approaching from the opposite direction and knocked to the ground by the negligence of defendant's servants in charge of such other car in failing to stop the same before striking plaintiff, after having discovered plaintiff's peril. *Held*, that the petition alleged two acts of negligence, which were not contradictory; hence plaintiff's failure to prove negligence on the part of the operatives of the car by which he was struck did not preclude him from recovering for the negligence of the operatives of the car on which he was riding in improperly starting the same.—*Spaulding v. Metropolitan St. Ry. Co.*, 107 S.W. 1049, 129 Mo. App. 607.

**App. 1911.** Where, in an action to recover for injuries to a passenger, plaintiff alleges specific acts of negligence, it is not sufficient to prove the mere relation of carrier and passenger, but the specific acts of negligence must be proved.—*Pidgeon v. United Rys. Co. of St. Louis*, 133 S.W. 130, 154 Mo. App. 20.

**App. 1911.** Where the petition in an action for injuries to a street car passenger in a collision between the car and a train at a railroad crossing alleges that the street railway company so negligently constructed, maintained, and operated its car line and the car as to cause the accident, plaintiff may recover on any conceivable negligence of the street railway company that could have caused the collision, and he need not adduce proof of specific negligence.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

**App. 1912.** Allegation, in action against a carrier for personal injuries, that "defendant carelessly and negligently operated said train in such manner that the train of cars

left the track," is a general charge, under which plaintiff need prove no special negligence, but only show derailment and injury.—*Moore v. Missouri Pac. Rty. Co.*, 147 S.W. 488, 164 Mo. App. 34.

**App. 1914.** A passenger need not prove all acts of negligence by the carrier charged in the complaint, if any one proved is sufficient to render the carrier liable.—*Zwick v. Swinney*, 165 S.W. 1124, 178 Mo. App. 142.

**App. 1915.** Where the petition alleges that the injury was caused by a violent stopping of the car, plaintiff must recover, if at all, on proof that the injury was the direct result of the stop.—*Allen v. Dunham*, 175 S.W. 135, 188 Mo. App. 193.

**App. 1918.** In a passenger's action for personal injuries due to the premature starting of a street car from which she was alighting, failure to prove negligence in violently starting the car was immaterial, where a premature starting was shown: it not being necessary to prove all the negligence alleged.—*Rogers v. Kansas City Rys. Co.*, 204 S.W. 595.

**App. 1919.** If a railroad passenger alleges injury because of specific acts of negligence, plaintiff must assume burden of proof and prove such specific negligence.—*Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

**App. 1920.** On proof merely of alleged negligent maintenance by defendant carrier on its premises of unguarded hole beside a path for travel between town and depot, and that this was the immediate and proximate cause of injury of plaintiff, who in leaving the depot by the path slipped into the hole, he can recover, irrespective of the question of negligence as to the path.—*Kaenter v. Missouri Pac. Ry. Co.*, 218 S.W. 349.

**App. 1922.** In an action for injuries to a passenger from a fall caused by a banana peeling, in which the petition alleged negligence of the carrier in failing to keep its platform in a reasonably safe condition, free from banana peelings and other slippery substances, it was necessary for plaintiff to show that the carrier had knowledge of the presence of the banana peeling, or by the exercise of ordinary care could have known of its presence in time to have removed it before the accident happened, or that the peeling had been in a position where it was likely to cause injury for such a length of time that it might reasonably be inferred that the carrier, in the exercise

of ordinary care, would have known of its presence in time to have removed it before the occurrence of the injury.—*Taylor v. Kansas City Terminal Ry. Co.*, 240 S.W. 512.

**App. 1928.** Passenger suing railroad for injuries in fall on train must establish negligence in particular pleaded.—*Jones v. St. Louis-San Francisco Ry. Co.*, 5 S.W.(2d) 101.

**App. 1928.** Injured passenger, alleging specific grounds of negligence held required to prove grounds as alleged.—*Walser v. Missouri Pac. R. Co.*, 6 S.W.(2d) 632.

#### —315 (4). Variance between allegations and proof.

**Sup. 1880.** Where the petition in an action against a railway company for damages sustained by a passenger alleged that the company failed to stop its train at the destination of a passenger, so as to enable the passenger to alight from the train, a recovery could not be had on proof that the company failed to keep the depot platform at the station properly lighted up; the statute providing for a variance not being applicable.—*Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414.

**Sup. 1885.** Where, in an action against a railroad company for injuries to a passenger, the petition alleged in substance that defendant's servants did not stop the train a sufficient length of time to allow a plaintiff to get off on the platform provided for the use of passengers, evidence that the train stopped at a place opposite the platform, but not for the purpose of discharging passengers, and then started without warning, in order to place the train at the usual stopping place, there was no variance, since the theory advanced by plaintiff's petition was that the train first stopped at a place which would lead him to believe was intended for the discharge of passengers.—*Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50.

**Sup. 1891.** That the evidence in an action by a passenger for injuries shows that things other than those alleged contributed to cause the injury will not defeat recovery. — *Buck v. People's St. Ry. & Electric Light & Power Co.*, 18 S.W. 1090, 108 Mo. 179, affirming (1891) 46 Mo. App. 555.

**Sup. 1892.** Where a petition charged negligence of the driver of a street car in prematurely starting it while plaintiff was alighting, and the evidence supported the charge, the fact that a defective brake contributed to the injury will not defeat a recovery, and consti-

tutes no variance.—*Buck v. People's Street Railway & Electric Light & Power Co.*, 18 S.W. 1090, 108 Mo. 179, affirming (1891) 46 Mo. App. 555.

**Sup. 1899.** A complaint setting forth as the negligence the act of the gripman of a street car in negligently operating the grip iron so as to cause the car to jerk with such force that it broke plaintiff's hold, and threw him on the street with great force, limits plaintiff to proof of the specific negligence averred.—*Bartley v. Metropolitan St. Rty. Co.*, 49 S.W. 840, 148 Mo. 124.

**Sup. 1899.** Where a petition alleged that plaintiff was a passenger in the caboose of a train, and was injured by being thrown out of the door, and on the ground, by a collision, he cannot recover by showing that he had reasonable cause to apprehend a collision, and that, believing the danger was imminent, he jumped from the train, and was injured, where such facts were not pleaded, since inconsistent with the specific negligence averred.—*Chitty v. St. Louis, I. M. & S. Ry. Co.*, 49 S.W. 868, 148 Mo. 64.

**Sup. 1903.** Plaintiff averred that she was received as a passenger in defendant's elevator, to be carried to the fourth floor, and was injured by reason of the negligence of the operator in not allowing her a reasonable time to alight at that floor. There was no conflict in the evidence that she was not allowed a reasonable time to alight, but defendant set up that she was allowed a reasonable time in which to indicate a desire to alight, and did not do so. *Held*, that the rule that plaintiff cannot count on one cause of action, and recover on another, especially when proof of the latter necessarily negatives the existence of the former, did not apply.—*Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246.

**Sup. 1904.** In an action by a passenger for injuries in a collision between an electric car and a cable car at a crossing, where the negligence alleged in the petition was the failure of the flagman to give "such signals as would have enabled the gripman and motorman, by the use of ordinary care, to have avoided said collision," and the evidence showed that the flagman gave both the gripman and motorman the signal to proceed at the same time, there was no material variance.—*Taylor v. Grand Ave. Ry. Co.*, 84 S.W. 873, 185 Mo. 239.

**Sup. 1905.** In an action for injuries to a passenger, where the petition charged the

place of the accident at or near the intersection of certain streets, and the evidence showed the place reasonably within the zone specified, there was no material variance.—*McCaffery v. St. Louis & M. R. R. Co.*, 90 S.W. 816, 192 Mo. 144.

**Sup. 1909.** In an action by a street car passenger for injuries the very act of negligence alleged must be proved, and, where it was alleged that plaintiff was injured on a south-bound car on the west side of a viaduct, he could not recover upon proof that he was injured on a north-bound car on the east side of the viaduct.—*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

**Sup. 1913.** In an action for injuries to one boarding a street car, variance between the allegation and proof as to the place of the accident *held* to be immaterial, under Rev. St. 1909, § 1846.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**Sup. 1917.** Evidence that a street car was moving slightly when plaintiff attempted to board it *held* not a fatal variance from allegations that the car had stopped and was "started" before plaintiff had time to get on it.—(*App.* 1913) *Gunn v. United Rys. Co. of St. Louis*, 160 S.W. 540, 177 Mo. App. 512, judgment reversed 193 S.W. 814.

**Sup. 1928.** Petition alleging plaintiff fell by descent of elevator and proof showing fall by its ascent did not show failure of proof but variance.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**App. 1879.** In an action against a carrier for personal injuries to a passenger, the fact that the injuries were the result of an act of God may be proven under the general issue.—*Gillespie v. St. Louis, K. C. & N. Ry. Co.*, 6 Mo. App. 554.

**App. 1900.** In an action for personal injuries, the petition alleged that defendant had stopped its car to allow plaintiff to enter the same, and that while he was proceeding to do so its motorman negligently turned on the current, and thereby caused said car to lurch forward, whereby plaintiff was thrown under said car and injured. Plaintiff's instructions told the jury that if defendant's motorman saw plaintiff's signal, and undertook to stop the car for the purpose of receiving plaintiff as a passenger thereon, and that at the time the car was nearly stopped or moving so slowly that plaintiff could have entered the same with safety by the exercise of reasona-

ble and ordinary care and that in exercising such care while attempting to get on board the car, and when he had taken hold of the handrail and had one foot on the step, the motorman in charge of the car negligently turned on the current and thereby caused the car to start suddenly forward, by reason whereof plaintiff was thrown down, ran over, etc. The evidence adduced by plaintiff tended to support the theory of this instruction, and no objection was taken thereto, either by demurrer or otherwise. *Held* that, even though the liability for the injury caused by suddenly starting a car which is standing still is established by proof of certain facts, and if the injury is caused by suddenly accelerating the speed of a moving car, the liability is established by proof of other and different facts, and that therefore the cause of action alleged is not that upon which plaintiff is permitted to recover, the judgment will not be reversed, as the allegation of the cause of action to which the proof was directed was not unproved in its entire scope and meaning, and there was not, therefore, an entire failure of evidence, the allegation that defendant "stopped" the car for the purpose of allowing plaintiff to get on the same being no more than the allegation of a matter of inducement, and no negligence being alleged in doing that act, the negligence alleged consisting of letting off the brake and turning on the current while plaintiff was in the act of getting on the car, so that it may be well doubted whether there was any substantial variance between the facts alleged and those proved.—*Hansberger v. Sedalia Electric Ry., Light & Power Co.*, 82 Mo. App. 566.

**App. 1903.** There is no variance between a complaint alleging that while plaintiff was alighting from a street car, and before she had a reasonable time to alight, the car started, and proof that it did not stop a sufficient time to allow her to alight, in view of her delay caused in assisting a young girl with her to alight.—*Hannon v. St. Louis Transit Co.*, 77 S.W. 158, 102 Mo. App. 216.

**App. 1903.** Evidence that the car had stopped and then started again as plaintiff's wife was stepping off, but before she reached the street, was not a variance as that was one form in which the matter was pleaded.—*Shareman v. St. Louis Transit Co.*, 78 S.W. 840, 103 Mo. App. 515.

**App. 1903.** Where, in an action for injuries to a passenger on a street car, the petition alleged negligence in that while the car was at a standstill, and plaintiff was alight-

ing, as defendant's servants well knew, they negligently started the car forward, by reason of which plaintiff was injured, such petition was supported by evidence that the conductor had knowledge that plaintiff was attempting to alight before the car started, and that under defendant's custom of operating its cars the motorman, when a car had been stopped for any purpose, started the same only after signal by the conductor, without proof that the motorman had knowledge that plaintiff was engaged in alighting at the time he started the car.—*Jacobson v. St. Louis Transit Co.*, 80 S.W. 309, 106 Mo. App. 339.

**App. 1904.** There can be no recovery for injuries received while attempting to alight from a slowly moving train, where the petition alleges negligence on the part of defendant in suddenly starting its train while plaintiff was in the act of alighting.—*Bond v. Chicago, B. & Q. Ry. Co.*, 84 S.W. 124, 110 Mo. App. 131.

**App. 1905.** Where, in an action against a street railway company for injuries to a passenger, she alleged that her injuries occurred because the car started with a sudden jerk before she had reached a place of safety thereon, and she testified in her examination in chief that the car was still as she attempted to get aboard it; that, as she was stepping on it, the car gave a jerk, which threw her over and against the back seat, causing her injuries—the fact that she testified on cross-examination that the car had started before it gave the sudden jerk did not establish such a variance between the pleading and proof as precluded plaintiff from recovery.—*Lehner v. Metropolitan St. Ry. Co.*, 85 S.W. 110, 110 Mo. App. 215.

**App. 1905.** Refusal to exclude plaintiff's evidence in an action for injury in alighting from a street car because of variance between the allegation of the petition that the ground was lower than the car, and proof that it was a foot higher than the floor of the car platform, is not ground for reversal, the variance being immaterial; the gravamen of the charge being the stopping of the car at an unsafe place to alight, and defendant not having, as required by Rev. St. 1899, § 655, alleged and proved by affidavit that it was misled by the variance.—*Senf v. St. Louis & S. Ry. Co.*, 86 S.W. 887, 112 Mo. App. 74.

**App. 1906.** An allegation in the petition, in an action against a street railway company for injuries received by a passenger while attempting to board a car in conse-

quence of the sudden starting of the car, that it had come to a stop when signaled and when plaintiff attempted to board it, is supported by evidence showing that the car had, on plaintiff's signal, so slackened its speed that it barely had a perceptible motion at the time he attempted to board it.—*Forrester v. Metropolitan St. Ry. Co.*, 91 S.W. 401, 116 Mo. App. 37.

**App. 1906.** Plaintiff alleged that, while a passenger on one of defendant's cars, defendant's servants in charge of said car so negligently managed said car as to cause it to sustain violent lurches and plaintiff to sustain a shock from said car and from the electricity, its motive power. The evidence showed that said car had stopped because of a blockade of cars, one of which was derailed: that the servants in charge of the latter car and the car next following, in attempting to replace the derailed car, had caused the outburst of electricity which caused the injury complained of; and that the servants in charge of the car on which plaintiff was a passenger were doing nothing at the time of the accident. *Held*, that defendant was not liable under the allegations.—*Coyne v. United Railways Co. of St. Louis*, 98 S.W. 110, 121 Mo. App. 114.

**App. 1907.** Though the cause of action pleaded is the negligent act of a carrier in suddenly starting a stationary car while plaintiff was stepping from it, she would be entitled to recover where the proof showed that the car was moving but not enough to enhance the danger of her act.—*Green v. Metropolitan St. Ry. Co.*, 99 S.W. 28, 122 Mo. App. 647.

**App. 1907.** Where a petition for injuries to a street car passenger alleged that the floor of the car was unfit for use, proof that the injury was caused by a defect in a trap door which formed a part of the floor did not constitute a variance.—*Jorden v. St. Louis & M. R. R. Co.*, 99 S.W. 492, 122 Mo. App. 330.

**App. 1907.** Where in a personal injury action by a passenger specific injuries are alleged, recovery cannot be had for injuries not so specified.—*Stevens v. Kansas City Elevated Ry. Co.*, 105 S.W. 26, 126 Mo. App. 619.

**App. 1907.** Where, in an action for injuries to a passenger, plaintiff relied solely for a recovery on defendant's alleged negligence in suddenly stopping a train with unusual violence, which was not negligent, but properly

done to avoid a collision, plaintiff could not recover for other or different causes of negligence, or on the theory of *res ipsa loquitur*.—*Todd v. Missouri Pac. Ry. Co.*, 105 S.W. 671, 126 Mo. App. 684.

**App. 1908.** In an action for injuries while alighting from defendant's train, the petition alleged that when the train arrived at the station defendant negligently failed to stop a sufficient time for plaintiff to alight, and that defendant's servants negligently suffered it to move with a sudden jerk, and failed to give any warning, and at that time plaintiff stepped on the car step to alight, and was violently thrown from the car, etc. It was inferable from the evidence that the train had stopped when plaintiff arose from her seat, and it began to move while she was on the platform or the steps of the car. *Held*, that the petition neither expressly nor inferentially alleged the train was in a motionless state when plaintiff attempted to step from the car to the platform and there was no failure of proof or variance between the evidence and the petition, and the question was not one of failure of proof for the court to determine, but of contributory negligence for the jury on conflicting evidence.—*Anderson v. Chicago & A. Ry. Co.*, 110 S.W. 650, 131 Mo. App. 580.

**App. 1908.** When action against carrier for injuries to passenger sounds in tort, allegation of contract of carriage is regarded as mere inducement.—*Canaday v. United Rys. Co. of St. Louis*, 114 S.W. 88. See Action, 27(4) in this Digest.

**App. 1908.** The petition, in an action to recover for injuries received from being thrown from a street car by the sudden starting of the car while plaintiff was attempting to alight, alleged that plaintiff was riding on the trailer, but there was evidence introduced at the trial that she was riding on the front car. *Held*, that the variance was not important.—*Peck v. Springfield Traction Co.*, 110 S.W. 659, 131 Mo. App. 134.

**App. 1908.** In an action against a carrier, plaintiff's right of recovery being predicated on the negligence of defendant in starting the train while plaintiff was in the act of alighting, the petition alleging that she was thrown from the car, it is immaterial whether the evidence shows she was thrown off or that she jumped off for safety.—*Saeger v. Wabash R. Co.*, 110 S.W. 686, 131 Mo. App. 282.

**App. 1910.** Plaintiff alleged that while she was a passenger in defendant's cab de-

fendant negligently so managed its team and cab that the team took fright and ran with the cab, and, on account thereof, she was thrown down in the cab, and was injured in her ankle, back, etc. The answer was a general denial, with the plea of contributory negligence. Plaintiff introduced evidence without objection showing that after she entered the cab, the team became frightened and started to run with the cab, but the testimony did not show whether the injury was caused by being thrown from her seat to the floor of the cab or while trying to get out of the cab while the team was running away, her testimony showing that she made an attempt to get out of the cab, while the team was running, and that her injury might have been caused thereby. Rev. St. 1899, § 656 (Ann. St. 1906, p. 674), provides that, when the variance between pleading and the proof is not material the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. *Held*, that the variance between the allegation that she was injured by being thrown down in the cab and the evidence that she was injured while attempting to get out of the cab was immaterial, and that defendant by failing to object to the testimony waived his objection to it, so that a charge forbidding recovery if plaintiff was injured while attempting to get out of the cab while the team was running away was error.—*Daley v. Redburn*, 127 S.W. 924, 143 Mo. App. 653.

**App. 1910.** The gravamen of an action for injuries to a passenger, so far as payment of fare is concerned, is that he paid his fare to the carrier for the service, and the variance between an allegation that he paid it to the conductor and proof that he paid it to the ticket seller was not substantial.—*Cornell v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 1021, 143 Mo. App. 598.

**App. 1911.** While a plaintiff can recover only on the cause pleaded yet in an action for injury to an alighting passenger there is no variance between a petition charging that plaintiff was thrown down by the sudden start of the car from a standstill, and evidence that the car was still moving though so slightly as to be imperceptible and wholly negligible as a factor in the fall.—*Kinyoun v. Metropolitan St. Ry. Co.*, 134 S.W. 15, 153 Mo. App. 477.

**App. 1911.** Where a petition alleged that the plaintiff, a young girl, was a passenger on one of defendant's street cars, and, upon her signal to stop, the car was brought

to a slow speed, and she went from her seat to the rear platform holding on to the rail, and that, while standing in apparent safety expecting to alight, those in charge negligently started the car with a violent jerk, throwing her to the ground, proof that the start was made in a sudden and violent manner did not prove a different cause of action from the premature starting alleged, but merely showed the manner of the breach of duty.—Musick v. United Rys. Co. of St. Louis, 134 S.W. 31, 155 Mo. App. 64.

**App. 1913.** Where a petition alleged that a passenger on a street car had passed through the rear vestibule and stepped down on the step of the car, when she was thrown therefrom by a sudden jerk, proof that she was stepping to the first step when she was thrown and injured was not a material variance.—Klass v. Metropolitan St. Ry. Co., 155 S.W. 57, 169 Mo. App. 617.

**App. 1913.** Where a passenger sues two connecting carriers jointly for personal injuries, there is no variance from the complaint in proving the sole negligent act of one of the carriers after dismissing the action as to the other.—Doster v. Chicago, M. & St. P. Ry. Co., 158 S.W. 440.

**App. 1914.** In an action by one who attempted to board a moving street car, evidence *held* to constitute a fatal variance from the petition.—Danielson v. Metropolitan St. Ry. Co., 162 S.W. 307, 175 Mo. App. 314.

**App. 1914.** Where the petition in a street car passenger's action alleged as negligence the unusual jerking or sudden starting up of the car without respect to whether it had previously stopped, proof that the car did not actually stop before the alleged negligent jerk was not a fatal variance.—Maier v. Metropolitan St. Ry. Co., 162 S.W. 1041, 176 Mo. App. 29.

**App. 1914.** In an action by a passenger injured in alighting from a car, proof that custom warranted his alighting where the car stopped, though not a regular stopping place, *held* not to support a recovery; the petition alleging the car was stopped to let off passengers.—Hays v. Metropolitan St. Ry. Co., 170 S.W. 414, 182 Mo. App. 393.

**App. 1915.** In action for injuries to passenger, claimed to have been crowded by street car conductor and caused to fall, *held*, that there was no material variance between the petition, the proof, and an instruction.—Tunchof v. Metropolitan St. Ry. Co., 177 S.W. 813.

**App. 1915.** In an action by one hurt in attempting to board defendant's street car, proof *held* not to show a willful injury, constituting a variance from the averments of negligent injury.—Boggs v. Harvey, 178 S.W. 807.

**App. 1916.** In street car passenger's action for injuries alleged to have been caused by suddenly starting car after slowing down at regular stopping place, such negligence *held* not proved.—Ward v. Harvey, 182 S.W. 105.

**App. 1916.** Allegations that plaintiff, a passenger, was injured because defendant railway company took the forward part of the train some distance from plaintiff's coach and negligently backed it into said coach, are supported by proof of a sudden jerk, by the collision alleged.—Johnson v. St. Louis & S. F. R. Co., 190 S.W. 352.

**App. 1917.** In an action for injuries by sudden starting of a street car which plaintiff was boarding, where petition alleged that plaintiff was thrown and then dragged and fell, evidence *held* to follow allegations of petition in this respect.—Beurskens v. Dunham, 193 S.W. 855.

**App. 1917.** Where a petition was based on railroad's negligence in maintaining an inadequate luggage rack in its station, failure to prove its allegations that the suit case which injured plaintiff was knocked off the rack by some one constitutes only a variance and not a failure of proof.—Wright v. Kansas City Terminal R. Co., 193 S.W. 963, 195 Mo. App. 480.

Where petition alleged defendant railroad negligently failed to provide a luggage rack in its station with a retaining rail to prevent baggage from falling off and the evidence showed an inch molding, there was a variance only.—*Id.*

**App. 1917.** In a street car passenger's action for injuries, *held*, that there was, at most, an immaterial variance, and not a total failure to prove the cause of action alleged.—Harriman v. Dunham, 196 S.W. 443.

**App. 1918.** Petition alleging that deceased was a street car passenger "until he reached a point at or near an intersection at a point within a few feet, about 30 feet, of where the car was required to stop and discharge passengers," and evidence that the car stopped about 30 feet before reaching the regular stopping place, did not present a variance.—Teske v. Kansas City Rys. Co., 204 S.W. 577.



**App. 1919.** In action against interurban railway, for failure to protect from assault by drunken fellow passenger, where petition charged that plaintiff was riding on a ticket purchased of defendant, and that while thus traveling for hire on defendant's car he was assaulted, and the proof was that at the time of the assault plaintiff was traveling on a cash fare paid to another company, a street railway company, and on a portion of the line of travel of the car owned by the street railway, on which defendant's car was operated, under an operating agreement complying with a city ordinance as to such operation, by defendant's crew acting as the crew and employés of the street railway, there was more than a variance requiring the observance of Rev. St. 1909, §§ 1846, 1847, to take advantage of it, but it amounted to a failure of proof justifying granting new trial after verdict for defendant.—*Wilcox v. Kansas City Western Ry. Co.*, 213 S.W. 156, 201 Mo. App. 510.

**App. 1919.** Where plaintiff charged negligence of defendant street railways company in starting the car suddenly after it had stopped at its usual place, and "while plaintiff was in the act of boarding the car at a time when she was in a position of danger," the negligence pleaded was such starting of the car, and plaintiff's statement that the car started with a jerk did not create a variance, but was immaterial; there being ample evidence upon the issue of the negligent starting of the car.—*Baldwin v. Kansas City Rys. Co.*, 214 S.W. 274.

**App. 1919.** Evidence that the car jerked or moved suddenly or abruptly as plaintiff was alighting was not a variance or departure from allegations that while she was alighting the car started up.—*Clymer v. Kansas City Rys. Co.*, 214 S.W. 423.

**App. 1923.** Where, in an action for injuries sustained by a passenger through the overturning of a step box upon which she stepped, the petition alleged that defendant so carelessly placed the box and the box was so insecure that, when plaintiff stepped upon it, the box slipped and turned, and caused plaintiff to fall, and the evidence showed that the unevenness of the pavement caused the box to turn, defendant could not resist recovery on the theory that the defective pavement was the proximate cause of the accident, the action being based upon the negligent placing of the step box.—*Tanner v. Chicago, R. I. & P. Ry. Co.*, 258 S.W. 730.

**App. 1924.** Where petition in passenger's personal injury action alleged negligence

of defendant in that conductor negligently directed plaintiff to alight from moving train, and defendant was not called on to defend against negligence of any other servant, there was failure of proof and not a mere variance when inference from evidence was that alleged negligent direction was given by brakeman.—*Bogress v. Wabash Ry. Co.*, 206 S.W. 333.

### 316. — Presumptions and burden of proof.

See ante, 3202.

Contributory negligence, see post, 344.

Instructions, see post, 321.

### 316 (1). In general.

Automobiles, 242.

The happening of an accident to a passenger during the course of his transportation raises a presumption of negligence against the carrier.

—**Sup. 1890.** *Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385; (1912) *Norris v. St. Louis, I. M. & S. Ry. Co.*, 144 S.W. 783, 239 Mo. 695; *Partello v. Missouri Pac. Ry. Co.*, 145 S.W. 55, 240 Mo. 122;

**App. 1905.** *Hamilton v. Metropolitan St. Ry. Co.*, 89 S.W. 893, 114 Mo. App. 504.

In a passenger's action for personal injuries, plaintiff may make out a prima facie case by showing the accident and resulting injury so as to raise a presumption of negligence, if negligence is alleged generally, but where specific acts of negligence are alleged he must prove the acts relied upon; no presumption of negligence arising.

—**Sup. 1906.** *Orrutt v. Century Bldg. Co.*, 99 S.W. 1062, 201 Mo. 424, 8 L. R. A. (N. S.) 929;

**App. 1910.** *Potter v. Metropolitan St. Ry. Co.*, 126 S.W. 209, 142 Mo. App. 220; *Detrich v. Same*, 127 S.W. 603, 143 Mo. App. 176; (1916) *Abernathy v. Lusk*, 182 S.W. 1049.

In an action by a passenger for personal injuries the burden is on him to prove defendant's negligence, and that such negligence caused the injury.

—**Sup. 1893.** *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 21 S.W. 1, 113 Mo. 570, 18 L. R. A. 599;

**App. 1905.** *Young v. Missouri Pac. Ry. Co.* (1904) 84 S.W. 175, judgment affirmed 88 S.W. 767, 113 Mo. App. 636.

**Sup. 1884.** Where a car in which passengers are conveyed is shown to be under

the control and management of servants of the carrier, and an accident which causes injury to one of the passengers is such as under ordinary circumstances does not happen if those who have the management of the car use proper care, it affords reasonable evidence, in the absence of explanation by the carrier, that the accident arose from want of care.—*Dougherty v. Missouri Pac. R. Co.*, 81 Mo. 325, 51 Am. Rep. 239.

**Sup. 1892.** In an action for the death of a person killed by a train at a station, on the ground that the train started before he had time to alight, where there is no evidence how the accident happened, or whether he was on the train or the station platform when thrown under the train, the company cannot be held liable because of the presumption that he was in the exercise of due care, since there is also a presumption, in favor of the carrier, that it performed its duty.—*Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 21 S.W. 1, 113 Mo. 570, 18 L. R. A. 599.

**Sup. 1895.** A charge that if plaintiff without negligence on his part, was injured in attempting to board defendant's train, "then the burden is thrown upon the defendant to show" that it was free from negligence, was properly refused.—*Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W. 331, 128 Mo. 64.

**Sup. 1895.** Where plaintiff, a passenger on a railroad train, is injured by the fall of a ventilating window of the coach in which she is riding, the burden is on defendant company to disprove negligence.—*Och v. Missouri, K. & T. Ry. Co.*, 31 S.W. 962, 130 Mo. 27, 36 L. R. A. 442.

**Sup. 1901.** A street-car company is not liable for injuries received by passengers through a car escaping down an incline, if it used the best machinery known, such as experience had shown was safe, and the accident was caused by something it could not have foreseen or guarded against, though it fails to show the immediate cause of the accident.—*Feary v. Metropolitan St. Ry. Co.*, 62 S.W. 452, 162 Mo. 75.

**Sup. 1903.** The burden is not shifted from a passenger on proof of her injury in alighting from a street car so as to require an explanation from the company, but she must also prove that the accident occurred through the company's fault.—*Peck v. St. Louis Transit Co.*, 77 S.W. 736, 178 Mo. 617.

**Sup. 1906.** In an action against a street railway by a passenger for injuries received

through being struck by a missile thrown by a bystander, no presumption of negligence on the part of the defendant arises from the mere fact of the injury.—*Woas v. St. Louis Transit Co.*, 96 S.W. 1017, 198 Mo. 604, 7 L. R. A. (N. S.) 231, 8 Ann. Cas. 584.

**Sup. 1908.** Where, in an action for injuries to a passenger in an elevator through the falling thereof, plaintiff was entitled to go to the jury on the presumption of negligence, an instruction that the burden of proving the specific facts causing the injury rested throughout the case on plaintiff was properly refused.—*Orcutt v. Century Bldg. Co.*, 112 S. W. 532, 214 Mo. 35.

**Sup. 1909.** Because plaintiff on her case in chief put in proof of some specific acts of negligence, she was not thereby precluded from the presumption of negligence to which she was entitled under her petition, which charged negligence in general terms and not specifically, though in so doing she assumed an unnecessary burden in making out a prima facie case.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

**Sup. 1909.** Prima facie, when a passenger is injured by an unusual occurrence, negligence of the carrier is presumed, and the burden of proof shifts to it to show that it was not negligent.—*Briscoe v. Metropolitan St. Ry. Co.*, 120 S.W. 1162, 222 Mo. 104.

**Sup. 1909.** Where plaintiff seeks to hold liable for personal injuries the lessor of a street railroad on which the injuries occurred, while plaintiff was attempting to board the car, and for the purpose of showing such liability introduces the lease in evidence, to avoid liability the burden is not on defendant of showing the filing with the Secretary of State its acceptance of the provisions of the act authorizing such lease as provided by Rev. St. 1899, § 1188 (Ann. St. 1906, p. 1002), and municipal consent to the lease as provided by Const. art. 12, § 20 (Ann. St. 1906, p. 204), as, in the absence of evidence to the contrary, defendant is presumed to have complied with such provisions.—*Graefe v. St. Louis Transit Co.*, 123 S.W. 835, 224 Mo. 232.

**Sup. 1909.** In an action for injuries from a carrier's negligence, if plaintiff shows that defendant was a common carrier, and that plaintiff was a passenger and injured by the carrier while being carried, it will be presumed that the injury was from the carrier's negligence.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1910.** Where a passenger specifies the negligence relied on by her for recovery, the burden is on her to establish the negligence alleged by a preponderance of the evidence.—*Sterrett v. Metropolitan St. Ry. Co.*, 123 S.W. 877, 225 Mo. 99.

**Sup. 1917.** When passenger was injured by failure of passenger elevator to stop at proper place, fact raises presumption of negligence on part of owner of elevator.—*McCardle v. George B. Peck Dry Goods Co.*, 195 S.W. 1034, 271 Mo. 111.

**Sup. 1921.** In a suit for injury to intending passenger, it appeared that a street car took an unexpected course, the back wheels going as they were intended and the front ones veering off by reason of a split switch and causing an unusual and dangerous movement of the car which could not have happened except for some defect in the track or car or some negligence in its management. *Held*, that defendant had burden of explaining the casualty; the machinery and appliances being peculiarly within defendant's knowledge.—*Mayne v. Kansas City Rys. Co.*, 229 S.W. 386, 287 Mo. 235.

**Sup. 1921.** Under the rule of *res ipsa loquitur* where a vehicle or conveyance is shown to be under the control or management of a carrier or his servants and the accident is such as under an ordinary course of things does not happen if those who have such management use proper care, the happening of the accident affords reasonable evidence, in the absence of explanation, that it arose from a want of proper care.—*Anderson v. Kansas City Rys. Co.*, 233 S.W. 203.

**Sup. 1921.** That a conveyance is under the control or management of a carrier or his servants, and an accident is such as ordinarily does not happen if those managing it use proper care, affords reasonable evidence, in absence of explanation, that the accident arose from want of care.—*Elliott v. Chicago, M. & St. P. Ry. Co.*, 236 S.W. 17.

**Sup. 1925.** Personal injury plaintiff alleging negligence generally does not lose right to rest on presumption of defendant's negligence by introducing evidence of specific negligence.—*Porter v. St. Joseph Ry., Light, Heat & Power Co.*, 277 S.W. 913, 311 Mo. 66.

**Sup. 1925.** Petition *held* to state case under doctrine of *res ipsa loquitur*, and to place burden on defendant to show want of negligence.—*Carlson v. Wells*, 276 S.W. 26, 42 A. L. R. 1319.

**Sup. 1928.** Widow suing for husband's death as result of injuries in wreck of train on which he was passenger has burden of proof (Rev. St. 1919, § 4217).—*Schulz v. St. Louis-San Francisco Ry. Co.*, 4 S.W.(2d) 762.

**App. 1877.** Presumption, from injury to passenger, as to negligence of carrier. See *Haderlein v. St. Louis R. Co.*, 3 Mo. App. 601, memorandum.

**App. 1878.** Where, from the character of the accident, it appears that it could not have happened, had there not been improper exposure on the part of the passenger, the accident itself cannot raise the presumption of negligence.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App.** The fact that an accident occurred on a railroad, whereby a passenger was injured, makes a *prima facie* case for the passenger.—(1890) *Norton v. St. Louis & H. Ry. Co.*, 40 Mo. App. 642; (1892) *Madden v. Missouri Pac. Ry. Co.*, 50 Mo. App. 666.

**App. 1890.** Where there is nothing in plaintiff's evidence raising any presumption of negligence on the part of the defendant, except the fact of the accident, such fact of itself is insufficient, where plaintiff's own evidence shows that he was not in the place set aside for passengers and does not show or tend to show that the accident would have happened to him if he had been in the proper place.—*Tuley v. Chicago B. & Q. Ry. Co.*, 41 Mo. App. 432.

**App. 1899.** Where a railway passenger suffers injury by the breaking down or overturning of the coach in which he is riding, the *prima facie* presumption is that it was occasioned by some negligence of the carrier, and the burden is cast on it to rebut the same and establish that there was no negligence on its part, and that the injury was occasioned by inevitable accident, or by some cause which human precaution and foresight could not have averted.—*Choquette v. Southern Electric Ry. Co.*, 80 Mo. App. 515.

**App. 1902.** Where plaintiff alighted from a street car, and, just as he passed around behind it, was struck by another car going in the opposite direction on the next track, negligence of the street car company could not be inferred from the mere happening of the injury.—*Hornstein v. United Rys. Co. of St. Louis*, 70 S.W. 1105, 97 Mo. App. 271.

**App. 1910.** In an action for the death of a passenger struck by a street car after he had alighted, the burden was on the plain-

tiff to show that the car struck decedent, that the accident occurred where passengers boarded and alighted from cars, and that the car striking him was running in excess of the limit provided by ordinance, and failed to sound a gong, and that the excessive speed caused the injury and death.—*Richter v. United Rys. Co. of St. Louis*, 129 S.W. 1055, 145 Mo. App. 1.

**App. 1910.** The mere fact of injury to a passenger while on his journey, without any evidence connecting the carrier with its cause, does not raise the presumption of negligence; but where the passenger establishes the relation of passenger and carrier, and indicates that his injury during transit resulted from a breach of a duty which the carrier owed pertaining to his safety, the presumption of negligence of the carrier arises, and it must, to defeat a recovery, explain it away.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

The presumption of negligence of a carrier arising from proof of injury to a passenger while in transit obtains until the carrier has overcome the same by proving that it discharged every obligation laid on it to the end of insuring the safety of the passenger in the circumstances of the case.—*Id.*

**App. 1911.** A passenger suing for injuries, who sets forth in the petition specific acts of negligence, assumes the burden of proving a reasonable inference of negligent operation proximately causing the injuries, and he may not rely on the doctrine of *res ipsa loquitur*.—*Allison v. St. Louis & H. Ry. Co.*, 137 S.W. 896, 157 Mo. App. 72.

**App. 1911.** Plaintiff, suing for injuries received while alighting from street car, testified that while making last step car suddenly started forward throwing him down on his left side. *Held*, that court could not be asked to presume that testimony was inconsistent with physical facts, and must be disregarded.—*Berry v. Metropolitan St. Ry. Co.*, 137 S.W. 602. See Evidence, ¶588 in this Digest.

**App. 1912.** The burden is upon the carrier to prove that an accident in which a passenger is shown to have been injured was unavoidable.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, 143 S.W. 865, 161 Mo. App. 515.

**App. 1913.** In a personal injury action by a passenger on a street car, an allegation in the complaint that the injury was caused through the carelessness and negligence of

the agents, servants, and employes of the corporate defendant is a sufficiently general charge of negligence to render the doctrine of *res ipsa loquitur* available.—*Erdmann v. United Rys. Co. of St. Louis*, 155 S.W. 1081, 173 Mo. App. 98.

**App. 1916.** One founding his cause of action upon a carrier's negligence has the burden of proof from the beginning to the end of the case.—*Tewis v. United Rys. Co. of St. Louis*, 185 S.W. 738.

**App. 1917.** Where petition against interurban railway for personal injuries in derailment charged general negligence, plaintiff's statement that she saw throwing of switch which caused partial derailment which injured her did not place case outside rule of *res ipsa loquitur*.—*Kilroy v. Kansas City & K. V. Ry. Co.*, 195 S.W. 522.

Presumption of carrier's negligence toward passenger under rule of *res ipsa loquitur* is not conclusive, but, to relieve carrier, evidence aliunde must satisfy jury that carrier was not guilty of negligence.—*Id.*

**App. 1917.** In action for death of passenger, plaintiff has burden of establishing *prima facie* case, and carrier is not bound where whole case rests on circumstantial evidence to advance a more plausible theory than that advanced by plaintiff.—*Daly v. Pryor*, 198 S.W. 91, 197 Mo. App. 583.

**App. 1918.** In action against street railway, plaintiff did not waive his rights under doctrine of *res ipsa loquitur*, because he undertook to show particularly the cause of the accident.—*Stofer v. Harvey*, 204 S.W. 587.

**App. 1919.** Where plaintiff railroad passenger proves an accident and resulting personal injury, a presumption of negligence arises, and defendant has burden of rebutting such inference.—*Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

Where plaintiff passenger, sitting near coach window, was injured by a cinder from locomotive on another track, defendant railroad was presumptively negligent, and has burden of showing contrary.—*Id.*

**App. 1920.** In an action against suburban railroad for injuries to prospective passenger, struck by car on station platform, passenger has burden of showing with reasonable certainty that the negligent act of defendant was one of the proximate causes of the injury.

—Willi v. United Rys. Co. of St. Louis, 224 S. W. 86, 205 Mo. App. 272.

**App. 1921.** In an action against a carrier for damages for an assault by conductor, the plaintiff had only to show that he was assaulted, the presumption then arising that it was an unlawful assault, and where to meet this defendant put in his answer that the assault was justified on the ground of self-defense and put in evidence to show such affirmative defense, it was then up to the plaintiff, to rebut that evidence, to show that the assault was not justified and not made in the defense of the conductor's person.—Parris v. Deering Southwestern Ry. Co., 227 S.W. 1071.

In an action against a carrier for damages for an assault and battery by conductor, where the defendant admitted that its conductor assaulted plaintiff, the burden rested on it to show that the assault was justified.—Id.

**App. 1921.** Where a carrier permitted a negro passenger to ride on its cars into a city where a mob attacked the car and injured the passenger, negligence of carrier will not be presumed from the mere happening of the accident.—Williams v. East St. Louis & S. Ry. Co., 232 S.W. 759, 207 Mo. App. 233.

**App. 1923.** To establish liability in a passenger's action for injury from negligent operation of a street car, there must be some proof of ownership, operation, or control, to cast a duty on defendant.—Lester v. Wells, 253 S.W. 387.

**App. 1926.** Motorbus passenger suing for injuries cannot be denied right to invoke rule of res ipsa loquitur by showing some specific act of negligence.—Heidt v. People's Motorbus Co. of St. Louis, 284 S.W. 840, 219 Mo. App. 683.

The skidding of an automobile or motorbus while traveling along wet street at eight or ten miles an hour cannot be presumed to be negligent.—Id.

**App. 1926.** Burden on passenger to recover for injuries in res ipsa loquitur case was to show that she was passenger on bus, and that it skidded or left road in unusual manner, and that she was injured without negligence on her part.—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo. App. 537.

**App. 1927.** Railroad's negligence was presumed on injury to passenger from filler block thrown against him by passing train.

—Thomas v. St. Louis-San Francisco Ry. Co., 293 S.W. 1051.

**App. 1927.** Injured passenger loses benefit of doctrine of res ipsa loquitur by introducing evidence of specific negligence only if it clearly shows what caused accident.—Smith v. Creve Coeur Drayage & Motorbus Co., 296 S.W. 457, 220 Mo. App. 1122.

Testimony of passenger injured when bus left pavement held not to show cause of accident so specifically as to exclude doctrine of res ipsa loquitur.—Id.

**App. 1928.** Where passenger makes out prima facie case under res ipsa loquitur rule, carrier has burden to establish lack of negligence.—Heidt v. People's Motorbus Co. of St. Louis, 9 S.W.(2d) 650.

### 316 (2). Statutory regulations.

See explanation, page iii.

316 (3). Where injury is caused by sudden jerks or by suddenly or prematurely starting or stopping car.

**Sup. 1884.** Where, after a passenger had entered a street car and was in the act of taking a seat, the car was started with such violence as to throw him against the glass of a car window, which broke under his weight and cut his arm, so that amputation was necessary, there was a presumption of negligence on the part of the servants in charge of the car, and the burden of proving that proper care was exercised was on the carrier.—Dougherty v. Missouri Pac. R. Co., 81 Mo. 325, 51 Am. Rep. 239.

**Sup. 1884.** In an action to recover damages for injuries received by plaintiff while a passenger on defendant's train, the injuries resulting from the sudden checking of the speed of the train, an instruction which puts the burden of proof on defendant to show that the checking of the speed of the train was the result of some unforeseen or unavoidable accident beyond the control of defendant's agents is not erroneous.—Coudy v. St. Louis, I. M. & S. Ry. Co., 85 Mo. 79.

**Sup. 1899.** The fact that a cable car gave a sudden jerk, throwing plaintiff from the running board is, per se, insufficient to make the company liable.—Bartley v. Metropolitan St. Ry. Co., 49 S.W. 840, 148 Mo. 124.

**Sup. 1904.** In an action for injuries to a passenger alighting from a street car, where the defense was that the car had not stopped for plaintiff to alight, but was moving at a rate of speed that rendered it dangerous for

her so to do, the burden was on plaintiff to prove that the car had stopped or had slowed down to a degree rendering it safe for her to alight, and that a new impetus was given to it while she was alighting.—*Reagan v. St. Louis Transit Co.*, 79 S.W. 435, 180 Mo. 117.

**Sup. 1904.** In an action by a passenger on a street car for injuries, a showing that the car came to a sudden stop whereby he was thrown from his seat, made out a prima facie case in his favor.—*Redmon v. Metropolitan St. Ry. Co.*, 84 S.W. 26, 185 Mo. 1, 105 Am. St. Rep. 558.

**Sup. 1909.** Plaintiff's evidence showed that defendant's cable car on which plaintiff was riding made an unusual and violent stop, so that the glass in the windows was shattered and plaintiff was thrown against a stove; that another passenger was thrown against a window with such force as to break the glass and bend the protecting bars; and that the car was run over the crossing at the full speed of the cable, which according to defendant's testimony, was violative of its rules. There was also evidence that an iron plate which was along the side of the cable conduit was struck by the grip shank and dented. *Held* to make out a case of presumptive negligence.—*Briscoe v. Metropolitan St. Ry. Co.*, 120 S.W. 1162, 222 Mo. 104.

**Sup. 1921.** The rule of *res ipsa loquitur* applies to action for the death of an employé of a transfer company, while loading a furnace on a freight elevator which suddenly started up, though deceased was in the employ of an independent contractor, the testimony showing that the elevator operator was in defendant's employ and under deceased's control only while serving him as he did any person using the elevator, and defendant owing deceased the same duty a railway carrier owes to passengers.—*Grimm v. Globe Printing Co.*, 232 S.W. 676.

**Sup. 1921.** A street railroad company is presumed to have knowledge of the customary practice of the motormen to accelerate speed of cars only on go ahead signals from conductors, if such practices have continued for a substantial time.—*Chapman v. Kansas City Rys. Co.*, 233 S.W. 177.

**Sup. 1928.** Petition alleging elevator started in motion and descended while plaintiff was alighting, causing plaintiff to fall, alleged general negligence within doctrine of *res ipsa loquitur*.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

Presumption under doctrine of *res ipsa loquitur* did not require verdict for plaintiff, but authorized such verdict.—*Id.*

**App. 1891.** Where, in an action against a carrier for injuries to a passenger, it appeared that the freight train on which plaintiff desired to take passage had obeyed a stop signal and was slowing down when plaintiff attempted to board the same, but in so doing he fell and was injured, owing to the train giving a sudden jerk, though there was no direct evidence to show the cause of the jerk, it would be presumed that it was owing to conduct on the part of those in charge of the motive power.—*Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

**App. 1900.** In order to recover from a cable railroad for injuries sustained by a passenger by reason of a jerk of the car, it is not enough to show that there was a jerk; but it must affirmatively appear that the jerk was an extraordinary or unusual one, attributable to a defect in the track and an imperfection in the car, or to a dangerous rate of speed, or to the unskillful handling of the car by the gripman.—*Pryor v. Metropolitan St. Ry. Co.*, 85 Mo. App. 367.

**App. 1906.** In an action for injuries to a person attempting to board a street car, where it is shown that the usual signal for starting the car was given at such a time as to cause injury to the plaintiff, the presumption is that it was given by the conductor.—*Kohr v. Metropolitan St. Ry. Co.*, 92 S.W. 1145, 117 Mo. App. 302.

**App. 1907.** Operators of a street car who make a sudden start of the car of sufficient violence to injure a passenger proceeding with reasonable care to reach a place of security are presumptively negligent, and the presumption becomes conclusive unless it is shown that the manner of starting the car was unavoidable in the exercise of the highest degree of care.—*Miller v. Metropolitan St. Ry. Co.*, 102 S.W. 592, 125 Mo. App. 414.

**App. 1907.** In an action for injuries to a street car passenger as she was endeavoring to alight, proof that the car was brought to a full stop to discharge and receive passengers, that it suddenly started while plaintiff was stepping to the street, and that she was injured in consequence of a fall caused by the starting of the car, was sufficient to raise a presumption that the starting of the car was due to negligence.—*Bell v. Central Electric Ry. Co.*, 103 S.W. 144, 125 Mo. App. 660.

Where a street car passenger was injured by the alleged premature starting of the car as she was endeavoring to alight, and the facts raised a presumption of negligence on the part of the carrier's servants, its liability for the injuries sustained was fixed, unless it could show affirmatively that, notwithstanding the existence of such facts, the starting of the car was the result of unavoidable accident or some cause beyond its control.—*Id.*

**App. 1907.** Where a passenger on defendant's train was thrown against one of the seats and injured by a sudden stoppage of the train, such evidence, in the absence of explanation by defendant, was prima facie to be attributed to defendant's negligence, under the doctrine of *res ipsa loquitur*.—*Todd v. Missouri Pac. Ry. Co.*, 105 S.W. 671, 126 Mo. App. 684.

**App. 1908.** In an action for injury to a passenger, the burden is on plaintiff to show that the jolt to which the injury was due was so sudden and unusual that it bespoke negligence.—*Hawk v. Chicago, B. & Q. Ry. Co.*, 108 S.W. 1119, 130 Mo. App. 658.

**App. 1910.** Proof that a street car was negligently started with a sudden jerk before a passenger had taken a seat in such a manner as to violently throw the passenger against the side of a seat made a prima facie case of actionable negligence, provided the passenger used due care.—*Brady v. Springfield Traction Co.*, 124 S.W. 1070, 140 Mo. App. 421.

**App. 1911.** Where, in an action for injuries to a passenger while attempting to board a street car, the evidence showed that plaintiff was injured by the jerking forward of a car on a designated avenue in a city, but there was no evidence as to whose car it was or by whom it was operated, and, so far as the evidence disclosed, any company other than defendant might have owned or operated the car, plaintiff could not recover.—*Reisenleiter v. United Rys. Co. of St. Louis*, 134 S.W. 11, 155 Mo. App. 89.

**App. 1914.** Evidence that decedent was a passenger, and was thrown from her seat by a sudden and unusual jerking of the car, was sufficient to show that it was negligently managed; the burden being upon defendant to show that the jerking was not caused by negligence.—*Maier v. Metropolitan St. Ry. Co.*, 162 S.W. 1041, 176 Mo. App. 29.

**App. 1915.** In an action for the death of a street car passenger from injuries due to a

violent stop of the car, plaintiff must prove the stop and that it directly resulted in the injury, but need not prove what negligent act produced the stop.—*Allen v. Dunham*, 175 S. W. 135, 188 Mo. App. 193.

**App. 1916.** The rule of *res ipsa loquitur* applies to injuries received by passengers from sudden jerking of freight or mixed trains, only when the facts disclose such an extraordinary jerk or jar as would not happen if those in charge had exercised high care which facts must be alleged and proved.—*Provance v. Missouri Southern R. Co.*, 186 S. W. 955.

**App. 1917.** Proof of the sudden starting forward of an electric car as a passenger was alighting raises the inference that it was caused by the motorman; there being no other reasonable or probable cause to which to attribute it.—*Hecke v. Dunham*, 192 S.W. 120.

**App. 1923.** A petition, alleging that defendant so negligently operated the train as to cause it to suddenly jerk with unusual and unnecessary force whereby passenger was injured, charges general negligence, authorizing the application of the doctrine of *res ipsa loquitur*.—*Rhodes v. Missouri Pac. R. Co.*, 255 S.W. 1084, 213 Mo. App. 515.

The cause of a sudden jerk with unusual force being within the knowledge of the carrier, the burden shifts to it to show that such an event, resulting in injury to a passenger, was not the result of carrier's negligence.—*Id.*

**App. 1927.** Allegation that employees negligently started street car held not to preclude application of doctrine of *res ipsa loquitur* in passenger's action for injuries.—*Lich v. Wells*, 296 S.W. 1013.

**App. 1928.** Motorbus passenger, suing for injuries where bus skidded, made out prima facie case of presumptive negligence arising under *res ipsa loquitur* rule.—*Heidt v. People's Motorbus Co. of St. Louis*, 9 S.W. (2d) 650.

### 316 (4). Where injuries are caused by collision.

In an action for injuries to a passenger from a railroad collision, it is presumed in the first instance that the collision was the result of the carrier's negligence, to rebut which defendant must affirmatively show that the collision was the result of inevitable casualty, or of some cause which human care and foresight could not prevent.

—**Sup.** 1904. *Magrane v. St. Louis & Suburban Ry. Co.*, 81 S.W. 1158, 183 Mo. 119;

**App.** 1903. *Robinson v. St. Louis & S. Ry. Co.*, 77 S.W. 493, 103 Mo. App. 110; (1905) *Estes v. Missouri Pac. Ry. Co.*, 85 S.W. 627, 110 Mo. App. 725; *Haus v. St. Louis & S. Ry. Co.*, 90 S.W. 1155, 111 Mo. App. 706.

**Sup.** 1895. Where a passenger is injured while in the car of a railroad company by a collision with the train of another company, the burden of showing that the accident was not due to the negligence of the company in whose car he was riding is on such company. —*Clark v. Chicago & A. R. Co.*, 29 S.W. 1013, 127 Mo. 197.

**Sup.** 1899. The fact of a collision by a street car with an approaching hook and ladder wagon is sufficient proof of negligence to entitle a passenger free from negligence to recover for injuries caused thereby, in the absence of evidence to the contrary. —*Olsen v. Citizens' Ry. Co.*, 54 S.W. 470, 152 Mo. 426.

**Sup.** 1908. Where plaintiff who was injured in a collision between street cars sued two street railroad companies, and charged that she suffered damages through the negligence of the servants of both, the burden was on her to prove such charge. —*Chlanda v. St. Louis Transit Co.*, 112 S.W. 249, 213 Mo. 244.

Where, in an action for injuries to plaintiff, a street car passenger, in a collision between the car on which she was riding and a following car, the petition counted on general negligence, plaintiff was entitled to the benefit of the doctrine *res ipsa loquitur*. —*Id.*

**Sup.** 1909. In an action for injuries to a passenger in a collision between cable trains, the only charge of negligence in the petition was that "the defendant carelessly and negligently caused and permitted the train on which plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid, that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant." *Held*, to be a charge of general negligence, so as to render applicable the doctrine of *res ipsa loquitur*. —*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

In an action for injuries in a collision, in which the passenger was free from fault, the

burden is on defendant to rebut the presumption of negligence. —*Id.*

**Sup.** 1909. The rule that a passenger makes out a *prima facie* case against a carrier for personal injuries when he shows that he was injured by a collision, and was himself free from negligence, applies only where the petition charges negligence generally, and does not apply where it specifically pleads the negligent acts which caused the injury, in which case the burden is upon plaintiff to prove his case and continues with him throughout the case. —*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

**Sup.** 1924. Complaint for injuries to passenger from collision of street cars, having alleged only general negligence, proof of relationship of carrier and passenger raises presumption of defendant's negligence in running the cars, operating in plaintiff's favor throughout the trial, in absence of countervailing evidence, and is not waived by unnecessary proof of specific acts of negligence. —*Kinchlow v. Kansas City, K. V. & W. Ry. Co.*, 264 S.W. 416.

In passenger's action for injuries from collision of street cars, complaint having alleged general negligence of defendant in operating its cars, defendant had burden of disproving notice to defendant of defective condition of its car prior to the accident. —*Id.*

**Sup.** 1927. Receivers operating railroad must show accident was "inevitable," where train ran into cars standing on track, injuring passenger. —*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**App.** 1887. Where plaintiff shows that he was a passenger on defendant's car, and was injured without fault on his part by a collision or other accident, he makes out a *prima facie* case, and the burden devolves on defendant to relieve itself from liability by proof showing that the injury was the result of an accident which the utmost diligence on its part could not have averted. —*Wilkerson v. Corrigan Consol. St. Ry. Co.*, 26 Mo. App. 144.

**App.** 1905. In an action for injuries to a passenger in a collision of defendant's cars, where defendant admits the relation of the carrier and passenger between the parties and the fact of the collision, it assumes the burden of disproving negligence. —*Wilbur v. Southwest Missouri Electric Ry. Co.*, 85 S.W. 671, 110 Mo. App. 689.



**App.** Proof of a collision between street cars operated by the same company injuring a passenger raises a presumption of negligence of the company, placing the burden of proving freedom from negligence on it.—(1906) *Goodloe v. Metropolitan St. Ry. Co.*, 96 S.W. 482, 120 Mo. App. 194; (1907) *Hunt v. Metropolitan St. Ry. Co.*, 103 S.W. 1088, 128 Mo. App. 79; (1912) *Meegan v. Same*, 142 S.W. 1104, 161 Mo. App. 45; (1914) *Tierney v. United Rys. Co. of St. Louis*, 171 S.W. 977, 185 Mo. App. 720; (1915) *Gillogly v. Dunham*, 174 S.W. 118, 187 Mo. App. 551.

**App.** 1908. A street car on which plaintiff was a passenger was stopped in the middle of a street crossing, and plaintiff was injured by the pole of a city fire department hose wagon, which crashed through the side of the car as the hose wagon was proceeding to a fire at a high speed. *Held* sufficient to establish a prima facie case of negligence of the railway company under the doctrine of *res ipsa loquitur*.—*Williamson v. St. Louis & M. R. R. Co.*, 113 S.W. 230, 133 Mo. App. 375.

**App.** 1910. In an action against a street car company for injuries to a passenger in a collision between a car and a metal tower erected in a public square near the track, plaintiff being wholly without fault, the doctrine of *res ipsa loquitur* applies.—*Wolven v. Springfield Traction Co.*, 128 S.W. 512, 143 Mo. App. 643.

**App.** 1910. A passenger who shows that the train collided with the top of a tree which had blown across the track, and that he was injured in consequence thereof, shows facts from which the presumption of negligence of the carrier arises, and it must show its freedom from breach of duty.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

The presumption of negligence of a carrier arising from proof of injury to a passenger in consequence of the train colliding with an obstruction on the track is not overcome in every case by the carrier showing conclusively that the obstruction was one not under its control, because there are instances where a carrier is otherwise negligent, and its negligence has operated proximately to occasion the obstruction.—*Id.*

**App.** 1911. Where a street car passenger proves that he was a passenger, and that he was injured in a collision between the car and a train at a railroad crossing, the street railway company has the burden of showing

that the collision was not caused by its negligence, but was due to unavoidable accident or to the negligence of another.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

**App.** 1911. Where the relation of carrier and passenger exists, ordinarily, a presumption of negligence or the doctrine of *res ipsa loquitur* alone will be sufficient as prima facie proof on showing the facts of a collision and injury.—*Miller v. United Rys. Co. of St. Louis*, 134 S.W. 1045, 155 Mo. App. 528.

**App.** 1913. Where a street car passenger was injured in a collision between defendant's street car and a switch engine, the *res ipsa loquitur* doctrine applied.—*Nagel v. United Rys. Co. of St. Louis*, 152 S.W. 621, 169 Mo. App. 284.

**App.** 1918. Allegations that street railway carelessly and negligently allowed street car on which plaintiff's wife was passenger to collide with another car on same track charged general negligence, to which the *res ipsa loquitur* doctrine applied.—*Stofer v. Harvey*, 204 S.W. 587.

**App.** 1919. In favor of street railroad's passenger suing its receivers, there is no presumption that she was injured at all in a collision, or consequently that her alleged condition resulted therefrom; the only presumption she can rely on is the presumption of negligence arising from the fact of collision.—*Stofer v. Dunham*, 208 S.W. 641.

**App.** 1920. Where street cars collided and a passenger on one was pushed or thrown into the street and injured, the carrier has burden of showing it was not negligent.—*Lowder v. Kansas City Rys. Co.*, 221 S.W. 800.

**App.** 1924. Where a street car and motor truck collided at crossroads, injuring a passenger, the doctrine of *res ipsa loquitur* applies in Missouri against the street car company or its receiver, though it had no control over the truck, and negligence is presumed.—*Gibson v. Wells*, 258 S.W. 1.

In a passenger's action against a street car company for injuries from a collision, the mere fact that plaintiff offers some proof of specific acts of negligence does not prevent her from invoking the *res ipsa loquitur* rule.—*Id.*

**App.** 1924. Proof of a collision between a street car and a motor truck, and consequent injury to a passenger in the former,

gives rise to a presumption of negligence, though the truck was not under the carrier's control, and casts on the latter the duty of showing that the collision could not have been avoided by exercising the highest degree of care.—*Cecil v. Wells*, 259 S.W. 844, 214 Mo. App. 193.

**App. 1927.** Injured passenger, relying on doctrine of *res ipsa loquitur*, need prove only relation of passenger and carrier, carrier's exclusive control of car, collision, consequent injury, and extent.—*Smith v. Creve Cœur Drayage & Motorbus Co.*, 296 S.W. 457, 220 Mo. App. 1122.

**App. 1927.** Where injured motorbus passenger made case under *res ipsa loquitur* doctrine, company must show absence of negligence.—*Stegman v. People's Motorbus Co. of St. Louis*, 297 S.W. 189, 193.

← 316 (5). Where injuries are caused by derailment.

In an action against a railroad company for personal injuries sustained by reason of the derailment of the car in which plaintiff was a passenger, the burden is on defendant to show that the derailment was not due to its negligence.

In an action against a railroad company for personal injuries sustained by reason of the derailment of the car in which plaintiff was a passenger, the burden is on defendant to show that the derailment was not due to its negligence.

—**Sup. 1890.** *Furnish v. Missouri Pac. Ry. Co.*, 13 S.W. 1044, 102 Mo. 438, 22 Am. St. Rep. 781; (1891) *Id.*, 15 S.W. 315, 102 Mo. 669, 22 Am. St. Rep. 800;

**App. 1890.** *Himmitt v. Hannibal & St. J. Ry. Co.*, 40 Mo. App. 654; (1907) *Bowlin v. Union Pac. R. Co.*, 102 S.W. 631, 125 Mo. App. 419.

**Sup. 1885.** Plaintiff having offered evidence tending to prove that he was a passenger on defendant's train, and that he was injured without any fault on his part by the derailment of the train, made out a *prima facie* case entitling him to a verdict, unless it was rebutted by the evidence of the defendant showing that the accident was not the result of want of care and vigilance on his part.—*Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 88 Mo. 348.

**Sup. 1904.** In an action for injuries to a passenger by a derailment of the car, caused by a defective switch, proof of the fact of derailment and of the injury was sufficient to

establish a *prima facie* case of the carrier's negligence, which, unless explained, entitled the passenger to a recovery.—*Logan v. Metropolitan St. Ry. Co.*, 82 S.W. 126, 183 Mo. 582.

**Sup. 1907.** Where a street car passenger was injured by the derailment of a car caused by a brick on the track, plaintiff established a *prima facie* case by proof of her relation as a passenger, and that she was injured by the derailment of the car.—*O'Gara v. St. Louis Transit Co.*, 103 S.W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

**Sup. 1909.** Where decedent was injured by being thrown against the stove by the sudden derailment of a street car, plaintiff could assume the derailment was caused by negligence, and if the company did not show want of negligence, or that the accident was caused by an independent cause, it would be conclusively presumed that the accident was due to its negligence.—*MacDonald v. Metropolitan St. Ry. Co.*, 118 S.W. 78, 219 Mo. 468, 16 Ann. Cas. 810.

**Sup. 1914.** Where a passenger was injured in a railroad wreck, the presumption is that such wreck was caused by some negligence of the carrier, and the burden of proof is upon the carrier to rebut this presumption and establish due exercise of care.—*Powell v. Union Pac. R. Co.*, 164 S.W. 628, 255 Mo. 420.

**Sup. 1916.** Proof that injury to passenger was caused by derailment throws the burden on defendant carrier to show freedom from negligence.—*Craig v. United Rys. Co. of St. Louis*, 185 S.W. 205.

**Sup. 1925.** Where street railway passenger showed that car was derailed, and that he was injured thereby, he had made *prima facie* case, and burden was on defendant to show that utmost skill, foresight, and diligence could not have prevented accident.—*Trowbridge v. Fleming*, 269 S.W. 610.

**Sup. 1926.** Presumption of railroad's negligence merely relieves one injured of necessity of alleging and proving specific negligence.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

Carrier must establish that injury to passenger in wreck was occasioned by inevitable accident, or by some cause which human precaution and foresight could not have averted.—*Id.*

**App. 1877.** Burden of proof as to negligence of carrier in action for injury to a

passenger, where car was thrown from the track. See *Haderlein v. St. Louis R. Co.*, 3 Mo. App. 601, memorandum.

**App. 1903.** An injury to a passenger by the derailment of a street car is of itself prima facie evidence of negligence on the part of the railroad company, which the latter is bound to rebut by proof that the accident was not due to the carelessness of its employes, in order to escape liability.—*Heyde v. St. Louis Transit Co.*, 77 S.W. 127, 102 Mo. App. 537.

**App. 1913.** The fact that the wheels of a passenger car left the rails and ran along the ties without any showing of defective wheels or trucks made a strong prima facie showing that the track or roadbed was defective.—*Williams v. Chicago, B. & Q. Ry. Co.*, 155 S.W. 64, 169 Mo. App. 468.

**App. 1914.** While the burden is not on a passenger, injured in a derailment, to show any negligence causing the derailment, where she alleges general negligence by the carrier, she may nevertheless show specific defects without destroying the presumption of negligence by the carrier.—*Patterson v. Springfield Traction Co.*, 163 S.W. 955, 178 Mo. App. 250.

**App. 1915.** That a passenger was injured by the derailment of the coach in which he was riding *held* to establish a prima facie case of the negligence of the carrier, and to escape liability it must repel it.—*Stegel v. Illinois Cent. R. Co.*, 172 S.W. 420, 186 Mo. App. 645.

**App. 1916.** Injuries through derailment, raise presumption of negligence.—*Jackmann v. St. Louis & H. Ry. Co.*, 187 S.W. 786.

**App. 1926.** Action for injury to passenger caused by derailment of train is within doctrine of *res ipsa loquitur*.—*Watson v. Chicago Great Western R. Co.*, 287 S.W. 813, 221 Mo. App. 621.

316 (6). Where accident is caused by collision with animals.

**Sup. 1927.** Carrier has burden of proving derailment causing injury to railway mail clerk on duty was inevitable accident, which could not have been avoided by use of "very high degree of care and caution."—*Scheipers v. Missouri Pac. R. Co.*, 298 S.W. 51.

**App. 1919.** In passenger's action against street railroad for injuries in collision, except as to negligence resulting in collision, which was presumed, plaintiff had burden to prove all other necessary elements of her case, such

as that she was injured in the collision.—*Stofer v. Dunham*, 208 S.W. 641.

**App. 1920.** Plaintiff having been a passenger on defendant street railway's car and free from negligence, proof of happening of collision between car and a team of horses and injury to plaintiff raises a presumption of negligence against the railway, and makes a prima facie case for plaintiff, casting burden on railway to show freedom from negligence.—*Yates v. United Rys. Co. of St. Louis*, 222 S.W. 1034.

316 (7). Machinery or instrumentalities, and defects therein.

**Sup. 1878.** If a hack used by a common carrier suddenly breaks down resulting in an injury to a passenger, it rests on the carrier to show that the hack was sound and road worthy, and that the accident was caused by a defect which could not have been foreseen by the utmost skill.—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

**Sup. 1892.** In an action against a cable railway for personal injuries caused by the running away of a car on which plaintiff was a passenger, the result of the breaking of a grip shank, the fact that the brakes proved insufficient to hold the cars when the grip shank broke raises a presumption that they were defective in construction.—*Sharp v. Kansas City Cable-Railway Co.*, 20 S.W. 93, 114 Mo. 94.

In an action against a cable railway for personal injuries caused by the running away of a car on which plaintiff was a passenger, the result of the breaking of a grip shank, plaintiff cannot complain that he was compelled to carry the burden of proof on the trial, when the court charged that "the burden of proof is upon the defendant to establish to the reasonable satisfaction of the jury that it could not discover any insufficiency of the grip shanks or rail brakes, if any there was, by the exercise of the utmost practicable skill and foresight."—*Id.*

**Sup. 1895.** When a passenger suffers injury by the breaking down or overturning of a railway coach, the prima facie presumption is that it was occasioned by some negligence of the carrier, and the burden is upon the carrier to rebut the presumption.—*Clark v. Chicago & A. R. Co.*, 29 S.W. 1013, 127 Mo. 197.

**Sup. 1895.** Where injury to a passenger is shown to have been occasioned by reason of some defect or imperfection of appliances,

or by some omission of duty or negligent act of the servants of the carrier, it raises a presumption of negligence on the part of the carrier.—*Hite v. Metropolitan St. Ry. Co.*, 31 S.W. 262, 130 Mo. 132, 51 Am. St. Rep. 555, rehearing denied 32 S.W. 33, 130 Mo. 132, 51 Am. St. Rep. 555.

**Sup. 1904.** Where the sudden stopping of a street car caused a passenger to be thrown from his seat and injured, and, in an action by him for the injury, the cause of the same was alleged to be the violent stopping of the car, and there was evidence that a bolt or piece of iron of some kind was taken out of the slot rail after the accident by defendant's servants and taken away by them, the character of such piece of iron being within the knowledge of defendant, the burden was on defendant to show how the obstruction, whatever it was, got into the rail.—*Redmon v. Metropolitan St. Ry. Co.*, 84 S.W. 26, 185 Mo. 1, 105 Am. St. Rep. 558.

**Sup. 1909.** Where the case discloses an unusual occurrence in the operation of machinery entirely under defendant's control, an injury without plaintiff's fault, and the undisputed relation of carrier and passenger, presumptive negligence arises, and the doctrine of *res ipsa loquitur* is fully applicable.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

**Sup. 1909.** In an action for injuries received while a passenger on an elevator, the evidence showed that plaintiff stepped into the elevator; that there was no person in the elevator to run it, and, that immediately upon her stepping in, the elevator began to descend and she was injured in attempting to get out. *Held*, that plaintiff was not required to show what might have caused the elevator to descend, nor to show that certain things did not cause it to do so, but was only required to show what did cause its descent.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1914.** Where a passenger was injured in a wreck caused by a broken rail, the proof raised a *prima facie* case under the doctrine *res ipsa loquitur* requiring submission to the jury.—*Brown v. Louisiana & M. R. R. Co.*, 165 S.W. 1060. See Carriers, ⇨ 320(12) in this Digest.

**Sup. 1928.** Plaintiff, injured by fall from elevator, was entitled to presumption that elevator was negligently maintained, constructed or operated, under doctrine of *res ipsa loquitur*.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**App. 1894.** In an action for injuries caused by plaintiff's dress catching on a threaded bolt on the platform of defendant's street car, causing her to fall to the ground, where there was no direct evidence that the bolt was an unusual appliance or dangerous, the evidence was not insufficient; the gravamen of the complaint being that the bolt extended three-eighths of an inch above the top, and no direct evidence was necessary to prove that a bolt in that condition is likely to produce such accidents.—*Chartrand v. Southern Ry. Co.*, 57 Mo. App. 425.

**App. 1904.** The law is that a railroad company engaged in the carriage of passengers is required, so far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries to its passengers from even the slightest negligence on its part, and when a passenger suffers injuries from the breaking down or overturning of the coach in which he is riding, a *prima facie* presumption arises that such casualty was caused by negligence on the part of the carrier, and the burden is on the latter to repel such presumption, and to show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted.—*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

**App. 1904.** Where a gate on the rear platform of a street car swung open while the car was in motion, allowing plaintiff to fall through and injuring her, the happening of the accident created a presumption of negligence on the part of the street car company, casting upon it the burden of showing freedom from negligence.—*Aston v. St. Louis Transit Co.*, 79 S.W. 999, 105 Mo. App. 226.

**App. 1904.** The doctrine of *res ipsa loquitur* applies to a handrail on a street car, used by passengers to assist them in boarding and alighting, and which gives way in the hand of a passenger struggling to regain his balance on the car's suddenly starting.—*McCarty v. St. Louis & S. Ry. Co.*, 80 S.W. 7, 105 Mo. App. 596.

**App. 1905.** The unexplained slipping of a brake on a street car, so that it revolves and strikes a passenger boarding the car in the face, authorizes an inference of negligence on the part of the employé in charge of such brake.—*Thompson v. St. Louis & S. Ry. Co.*, 80 S.W. 465, 111 Mo. App. 465.

**App. 1906.** Proof of injury to a passenger, by the heel of her shoe catching on a

piece of metal projecting from the step of the street car, makes a prima facie case of negligence, putting on the carrier the burden of disproving it.—*Rattan v. Central Electric Ry. Co.*, 96 S.W. 735, 120 Mo. App. 270.

**App. 1907.** The collapse of a trap door forming a part of the floor of a street car, under the weight of a passenger who was simply walking thereon, resulting in injury to her, was evidence of negligence under the doctrine *res ipsa loquitur*.—*Jorden v. St. Louis & M. R. R. Co.*, 99 S.W. 402, 122 Mo. App. 330.

**App. 1907.** Where a passenger on a street car was injured by stepping on an electrified metal plate in defendant's car, and receiving an electric shock, the burden was on defendant to show that the presence of the electricity could not have been detected and prevented by the exercise of the highest degree of care.—*McRae v. Metropolitan St. Ry. Co.*, 102 S.W. 1032, 125 Mo. App. 562.

**App. 1910.** In an action for injuries from a defect in a station platform received in alighting, the burden is on plaintiff to show that the injury is directly traceable to the accident.—*McClanahan v. St. Louis & S. F. R. Co.*, 126 S.W. 535, 147 Mo. App. 386.

**App. 1914.** The burden was on the plaintiff, in an action for injuries received by him from leaning against a defective truck on defendant's station platform, where he was waiting to meet a passenger, to show that his injury was caused by defendant's negligence.—*Stark v. Chicago, R. I. & P. Ry. Co.*, 166 S.W. 850, 179 Mo. App. 225.

**App. 1916.** One invited to take passage in an elevator, injured by the falling of the door, cannot be deprived of the presumption of *res ipsa loquitur* in her favor by reason of evidence introduced by defendant.—*Anderson v. American Sash & Door Co.*, 182 S.W. 819.

316(8). Where injuries are caused by explosion.

**App. 1905.** The mere fact that a locomotive boiler exploded, injuring a passenger was prima facie proof that the engine was unsafe or mismanaged.—*Kelly v. Chicago & A. Ry. Co.*, 87 S.W. 583, 113 Mo. App. 468.

**App. 1905.** An explosion occurred on an electric car, breaking the window glass, causing the car to burst into flames and frightening the passengers, one of whom was injured by either jumping or being pushed out of a

window. *Held* sufficient to establish a prima facie case of negligence on the part of the carrier.—*Brod v. St. Louis Transit Co.*, 91 S.W. 993, 115 Mo. App. 202.

**App. 1914.** Occurrence of violent explosion of street car controller, accompanied by loud detonations, electric fire, heat, smoke and obnoxious fumes, *held* prima facie evidence of negligence and to impose on the company the burden of proving unavoidable accident.—*Agnew v. Metropolitan St. Ry. Co.*, 165 S.W. 1110, 178 Mo. App. 119.

316(9). Where person injured is passenger on freight train.

**App. 1902.** More or less jerking and jolting being incident to the operation of a freight train, negligence cannot be inferred from the mere fact that a passenger thereon was injured from a jar occasioned by the sudden stopping of the train.—*Erwin v. Kansas, Ft. S. & M. Ry. Co.*, 68 S.W. 88, 94 Mo. App. 289.

In an action for personal injuries received while riding as a passenger on a freight train, negligence could not be inferred from the mere fact that the plaintiff was injured from a jar occasioned by the stopping of the train, in view of the fact that there is more or less jerking and jolting incident to the operation of such trains.—*Id.*

**App. 1907.** In an action for injuries to a passenger on a freight train, where it was proved that the injury was caused by the sudden and violent stopping of the train, a prima facie case was made out against the carrier which cast upon it the burden to show that the accident was not the result of a want of care and skill which the law imposes upon a common carrier.—*Russell v. Quincy, O. & K. C. R. Co.*, 102 S.W. 613, 125 Mo. App. 441.

**App. 1908.** The fact that a sudden and violent jolt or jar accompanies the stopping of a freight train will not raise ipso facto a presumption of negligence.—*Hawk v. Chicago B. & Q. Ry. Co.*, 108 S.W. 1119, 130 Mo. App. 658.

The fact that a passenger on the seat running lengthwise of a caboose, with his face turned toward the door, was thrown therefrom to the floor by a jolt accompanying the stopping of the train, is insufficient to raise a presumption of negligence.—*Id.*

**App. 1908.** The *res ipsa loquitur* doctrine applies to injury received by a passenger on a freight train where cars were cou-

pled so violently that he was thrown from a trunk on which he was sitting in the caboose, through a side door, to the ground, a water keg in the car was overturned, etc.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

**App. 1910.** The mere fact that a person, in attempting to board a moving freight train, is thrown off by a jerk of the train, does not warrant the conclusion of defective track or train appliances or negligent operation, and hence the doctrine of *res ipsa loquitur* does not apply.—*Ray v. Chicago, B. & Q. Ry. Co.*, 126 S.W. 543, 147 Mo. App. 332.

**App. 1910.** Where a passenger on a freight train was injured as the result of a sudden jerk, the doctrine of *res ipsa loquitur* does not obtain so as to require the carrier to acquit itself of negligence in the absence of proof that the jerk was extraordinary and unusual.—*Tickell v. St. Louis, I. M. & S. Ry. Co.*, 129 S.W. 727, 149 Mo. App. 648.

—317. — **Admissibility of evidence.** Contributory negligence, see post, —345.

—317 (1). **In general.**

**Sup. 1888.** In an action for injuries from the negligent starting of a street car, testimony of a former driver of the same car that there were four different teams used, one of which was apt to start with a jerk, while the others were tractable, and that, though he had left the service of defendant, he knew that the same teams were employed on the car up to the time of the accident, though he could not say which team was attached to the car on that day, is admissible, though the real issue in the case was the conduct of defendant's servant in the management and control of the motive power.—*Dougherty v. Missouri R. Co.*, 8 S.W. 900, judgment reversed on rehearing 11 S.W. 251, 97 Mo. 647.

**Sup. 1920.** In an action for injuries sustained in a train wreck, evidence that the train was running on regular time, and as to the distance between two points, was competent.—*Day v. Lusk*, 219 S.W. 597.

**Sup. 1922.** In a street railway passenger's action for injuries sustained while alighting, testimony of plaintiff that after an examination by a physician she suffered pain and had a fainting spell after leaving his office *held* admissible, in connection with testimony by the physician that he made an examination of plaintiff's limbs, resulting in pain, and that it disclosed excessive tenderness

as against an objection that the injury must have resulted from defendant's act.—*Looft v. Kansas City Rys. Co.*, 246 S.W. 578.

**App. 1877.** Admissibility, in action for injuries to a passenger, of evidence as to the condition of the track, together with the rate of speed. See *Haderlein v. St. Louis R. Co.*, 3 Mo. App. 601, memorandum.

—317 (2). **Notice to carrier of matters calling for exercise of care.**

**Sup. 1926.** Evidence of statement of section foreman showing knowledge of condition of bridge *held* competent for substantive purposes in action for injuries to mail clerk.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

**App. 1921.** In an action for injuries from being pushed under a moving street car by a crowd of fellow passengers on Sunday, evidence of the behavior of the usual Sunday and holiday crowds was admissible as bearing on defendant's duty to anticipate the danger and guard against it, and the fact that at times the crowds were larger would make no difference, since the crowd, whether large or small, acted in the same way.—*Grubb v. Kansas City Rys. Co.*, 230 S.W. 675, 207 Mo. App. 16.

—317 (3). **Acts or omissions and competency of carrier's employes.**

**Sup. 1874.** In an action against a street-railway company for damages for breach of duty by the defendant, as a common carrier, in carrying a passenger, the evidence showed that the driver of the car insulted and abused the passenger, and threatened to put him off the car; that such threats and insults were kept up until the car reached a station, where another driver was placed in charge of the car, the first driver still remaining in the car, and continuing the conduct complained of. *Held*, that evidence as to the insults and acts of the driver after he had been relieved by the second driver was properly admitted.—*Malecek v. Tower Grove & L. Ry. Co.*, 57 Mo. 17.

In an action against a street-railway company to recover damages for insulting and abusive acts of an employé, having charge of the car, to a passenger on such car, it appeared that, a few days after the acts complained of, plaintiff called upon the superintendent of the company, who refused to hear anything relative to the transaction, and told plaintiff that he had directed the drivers to throw him out of the car. *Held*, that evidence of these facts was admissible to prove that the com-

pany, through the superintendent, had recognized the assault by the driver.—Id.

**Sup. 1890.** In an action for injuries sustained by jumping from a moving train because of improper conduct of the conductor, it was proper for plaintiff to explain the reason for such an act on his part, over an objection that the question was incompetent and irrelevant.—*Spohn v. Missouri Pac. Ry. Co.*, 14 S.W. 880, 101 Mo. 417.

**App. 1884.** Other acts of violence by servants of carrier. See *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584, memorandum.

**App. 1910.** In an action against a railway company for an assault by a brakeman upon a passenger who attempted to board a train after it started, and exhibition of whose ticket was demanded by the brakeman on the car steps, evidence that the passenger was crippled and thus prevented from boarding sooner was proper.—*Cathey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

317 (4). Condition of carrier's premises.

**Sup. 1902.** On an issue whether a platform on which plaintiff slipped while jumping from a moving train was greasy at the time, evidence as to whether there was grease on it five months before was too remote.—*Newcomb v. New York Cent. & H. R. Co.*, 69 S.W. 348, 169 Mo. 409.

On an issue whether a platform on which plaintiff slipped while jumping from a moving train was greasy at the time, evidence as to whether there was grease on the platform a week afterwards was inadmissible.—Id.

**Sup. 1909.** In an action for injuries to a passenger caught between the car and a railing parallel to the track extending over a viaduct, evidence is not admissible to show how similar viaducts are protected by railings in other cities, as the question in issue was whether the construction and maintenance of the particular railing was negligence, which must be decided from evidence showing its construction.—*Joyce v. Metropolitan St. Ry. Co.*, 118 S.W. 21, 219 Mo. 344.

317 (5). Condition of vehicles and appliances.

**Sup. 1902.** Where a passenger, by mistake, boarded the wrong train, and was injured by jumping from it while in motion, evidence as to whether there were signs or placards on the car five months previous was too remote to afford a basis for an inference

as to the condition at the time of the accident.—*Newcomb v. New York Cent. & H. R. Co.*, 69 S.W. 348, 169 Mo. 409.

**Sup. 1908.** In an action for injuries to a passenger in an elevator, through the falling thereof, evidence relating to the condition of the elevator as far back as two years prior to the injury and on down to within a few days thereof, and tending to show that the elevator would not run properly, that the cable was rusty and rotten, that bolts were loose, that the guide shoes were constantly getting out of place, and that the rod governing the safety appliances was so bent they would not properly perform their functions was admissible.—*Orent v. Century Bldg. Co.*, 112 S.W. 532, 214 Mo. 35.

**Sup. 1921.** That a door of an interurban car equipped with an automatic catch or spring to keep the door open closed on a passenger's hand spoke for itself, and raised an inference that the catch was defective, though there was testimony that after the accident the conductor examined the catch and found it in good condition.—*Anderson v. Kansas City Rys. Co.*, 233 S.W. 203.

317 (6). Condition of track or roadbed.

**Sup. 1882.** In an action against a railroad company, based on defendant's negligence in running its trains over a portion of its road, rendered dangerous by reason of having been undermined by a flood of water, it appeared from the evidence that the rain-storm on the night of the disaster was wholly unprecedented in violence, and the quantity of water which fell during its continuance was on that account of such a character that defendant, in construction of its roadbed, was not required to anticipate or provide against it. *Held*, that evidence to the effect that, after the accident, a new pile bridge had been built by defendant where the old one was, was inadmissible.—*Ely v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 34.

**Sup. 1885.** In an action against a carrier for injuries to a passenger caused by the derailment of a train, evidence of the condition of the roadbed at places other than the immediate vicinity of the accident, and of other accidents occurring at such places, is properly excluded.—*Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 88 Mo. 348.

In an action against a carrier for injuries to a passenger, evidence that defendant, several months after the accident causing the injury, repaired its road by putting in new

rails and ties at various places, was inadmissible.—*Id.*

**Sup. 1887.** In an action against a railroad company for injuries to a passenger claimed to have been caused by the bad condition of defendant's track at the place of the accident, the condition of the roadbed at the place or in the immediate vicinity of the accident may be shown; but evidence as to its condition a mile and a half from the place of the accident is incompetent and inadmissible.—*Slidekum v. Wabash, St. L. & P. Ry. Co.*, 4 S.W. 701, 93 Mo. 400, 3 Am. St. Rep. 549.

**Sup. 1904.** Where, in an action for injuries to a passenger on a street car by reason of an alleged defective switch, there was evidence that the switch was in the same condition at the time it was examined by a witness, eight days after the accident, as it was at the time of the accident, his evidence as to its condition when he examined it was not objectionable as too remote.—*Logan v. Metropolitan St. Ry. Co.*, 82 S.W. 126, 183 Mo. 582.

**Sup. 1908.** In an action for death of a passenger, caused by his being struck by a car on the adjacent track going in the opposite direction from the one in which he was riding by protruding his head outside of the car, evidence as to whether the surface of the rails and tracks at the point of the injury were even or uneven was admissible.—*Gage v. St. Louis Transit Co.*, 109 S.W. 13, 211 Mo. 139.

**Sup. 1909.** In an action for injuries to a street car passenger struck by a cross-beam near the track on a curve, evidence that one track at that place was higher than the other causing a car passing the beam, in rapid motion, to lurch, throwing the car near to the beam, was admissible on the question of the company's negligence.—*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

**Sup. 1915.** Where a passenger was thrown from a street car and killed, evidence that other cars of the same pattern jolted badly over the uneven tracks at that point is admissible.—*Hatchett v. United Rys. Co. of St. Louis*, 175 S.W. 878.

Where a passenger was thrown from a street car and killed, evidence of a depression in the tracks, causing jerks, was admissible.—*Id.*

**App. 1878.** In an action against a street railroad for injuries to a passenger, caused

by a defective condition of the track, testimony as to the condition of the track at other points and at another date from the time of the accident should have been excluded.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

317 (7). Taking up and setting down passengers.

**Sup. 1908.** In an action for injuries, sustained in attempting to board a street car, evidence that the car "was going at the ordinary rate of speed of a car crossing a crossing, stopped on both sides," was properly excluded.—*Peterson v. Metropolitan St. Ry. Co.*, 111 S.W. 37, 211 Mo. 498.

**Sup. 1920.** In an action for injuries to passenger carried past her station and struck by another car in going back to her destination, evidence that conductor stopped the car at place beyond station and pointed out lights at place of destination was admissible under petition alleging that conductor directed plaintiff to alight at that place.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

317 (8). Management of conveyances.

**Sup. 1899.** In an action by a street-car passenger for injuries caused by a collision with a hook and ladder wagon, evidence as to how far a gong on the wagon could be heard is admissible, where defendant claims that the collision was caused by the gripman's failure to hear any gong, and there was evidence, that the gong was sounded.—*Olsen v. Citizens' Ry. Co.*, 54 S.W. 470, 152 Mo. 426.

**Sup. 1905.** Where, in an action for injuries to a passenger on a street car in collision with a railroad train at a crossing, the motor-man in charge of the car testified that he discovered the danger of a collision in time to have stopped the car which he failed to do because his appliances were defective, he was not entitled to presume that the approaching train was running within the rate of speed prescribed by a city speed ordinance, and hence such ordinance was inadmissible in defendant's favor.—*Bragg v. Metropolitan St. Ry. Co.*, 91 S.W. 527, 192 Mo. 331.

Where, in an action for an injury to a passenger on a street car in a collision with a railroad train, a city ordinance regulating the speed of trains at the point in question was otherwise competent, it was no objection to its admission that it had been repealed.—*Id.*

**Sup. 1910.** Where plaintiff claimed that his injuries were caused by the sudden jerk of a cable car which had just passed over a crossing of other tracks, after stopping to let



passengers alight, evidence of the condition of the tracks at the crossing and the machinery were proper, though negligence in that respect was not alleged, since such evidence was merely to show whether there was a stop, a start, and a jerk, especially where no defects were shown.—Setzler v. Metropolitan St. R. Co., 127 S.W. 1, 227 Mo. 454.

**Sup. 1920.** In action for injuries to passenger in collision of street cars, motorman's testimony as to how far he was from other car when he concluded that there was danger of a collision *held* inadmissible; the question being when he should have reached such conclusion, and such question being for the jury.—Ganz v. Metropolitan St. R. Co., 220 S.W. 490.

**Sup. 1923.** In an action by a passenger against a street railway for injuries suffered in a collision, testimony that the rear end of one car was materially damaged, and that there were several people injured, was properly received as part of the res gestæ and as tending to show the force of the collision.—Gaty v. United Rys. Co., 251 S.W. 61.

**Sup. 1925.** Evidence as to crowded conditions and open doors of car *held* relevant in determining carrier's degree of care.—Carlson v. Wells, 276 S.W. 26, 42 A. L. R. 1319.

**App. 1905.** In an action by a passenger for injuries sustained in a collision, in which defendant denied that plaintiff was injured, evidence as to the number of persons killed in the collision was admissible to show its severity.—Estes v. Missouri Pac. Ry. Co., 85 S.W. 627, 110 Mo. App. 725.

**App. 1908.** In an action by a street railway passenger for injuries in a collision between defendant's street car and a railroad train, an ordinance requiring watchmen to be kept at all railroad crossings, to perform such duties as might be prescribed by ordinance, was inadmissible, in the absence of evidence of ordinances prescribing such duties, since the court could not, as a matter of law, assume that the duties were such as are usually rendered in such cases by watchmen.—Wills v. Atchison, T. & S. F. Ry. Co., 113 S.W. 713, 133 Mo. App. 625.

**App. 1912.** In an action for injuries to a street car passenger while attempting to board a street car, plaintiff having shown that the motorman asked him to board the car while it was moving, testimony of a third person that as the car was coming to a stop he boarded it, but that before others could do

so it started with a jerk, *held* admissible to corroborate plaintiff's theory.—Fults v. Metropolitan St. Ry. Co., 148 S.W. 210, 164 Mo. App. 101.

**App. 1918.** In action against receivers of street railway for injuries to passenger at railroad crossing, evidence that on prior eastward trip car was delayed ten minutes on account of controller dropping off, was inadmissible to prove negligence of conductor in failing to go ahead at crossing on westward trip to look for train.—Bergfeld v. Dunham, 201 S.W. 640.

In action against receivers of street railway for injuries to passenger at railroad crossing, evidence that car on prior eastward trip was delayed by controller dropping off was not admissible to show delay had thrown car behind time so that crew were too hurried to stop at crossing to look for train.—Id.

**App. 1920.** In an action by a street car passenger for injuries claimed to have been caused by a sudden jerk of the car while she was entering, evidence that other persons in the car were shaken up by the same movement is admissible to show the character of the jerk.—Ownby v. Kansas City Rys. Co., 228 S.W. 879.

### 317(9). Other accidents or similar transactions.

**Sup. 1904.** In an action against a railroad company for injuries to a passenger from slipping on a station platform, evidence that shortly after the accident great crowds arrived at and departed from the station without accident was properly excluded.—Newcomb v. New York Cent. & H. R. R. Co., 81 S.W. 1069, 182 Mo. 687.

**Sup. 1906.** In an action against a street railway by a passenger for injuries received through being struck by a missile thrown by a bystander near a street corner, where the car was by ordinance required to stop, plaintiff's evidence, offered to show prior assaults on the car for failure to stop at such corner, was not so framed as to exclude sporadic assaults occurring during a period of years, or as to show a frequent occurrence thereof, indicating future repetition. *Held* properly rejected as too indefinite and not bringing home to the company facts indicating danger to its passengers.—Wons v. St. Louis Transit Co., 96 S.W. 1017, 198 Mo. 664, 7 L. R. A. (N. S.) 231, 8 Ann. Cas. 584.

**Sup. 1909.** In an action for injuries to a passenger in a collision between cable trains

caused by the loss of control of one of them on an incline, evidence was admissible as tending to show failure to exercise the degree of care required as to rail brakes effectively used in stopping cars on a similar incline on which defendant operated its cars, but which it failed to have on the car in question, or in use on the line where the accident occurred.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 St. Rep. 588.

**Sup. 1923.** Where plaintiff claimed she was injured when the car suddenly started without giving her time to alight, evidence that she had rung the bell for the car to stop at each of the two streets before the one at which it did stop, and that the conductor had failed to stop the car at those streets, was admissible as tending to prove that the conductor was heedless of his business, and therefore tending to prove he negligently started the car without giving plaintiff a reasonable time to alight. (Per Woodson, J.)—*Moss v. Wells*, 249 S.W. 411.

**Sup. 1923.** In an action by a passenger for injuries received in a street car collision, testimony that witness saw men laid out on the sidewalk was admissible in that it tended to show the force of the collision.—*Gaty v. United Rys. Co.*, 251 S.W. 61.

**App. 1914.** One suing for injuries while attempting to alight from the car suddenly starting and throwing her to the ground may not prove other accidents on cars in charge of the same servants or in charge of other servants.—*Baker v. Metropolitan St. Ry. Co.*, 168 S.W. 842, 181 Mo. App. 392.

**App. 1917.** In action for injuries caused by suit case falling from luggage rack in defendant's railroad station, evidence that similar accidents had not occurred is incompetent, especially where the defect in the rack was obvious and there was no proof it was constructed in the usual way.—*Wright v. Kansas City Terminal R. Co.*, 193 S.W. 963, 195 Mo. App. 480.

**App. 1918.** In action against street railway for injuries to passenger in collision with train at crossing, evidence that on that night a negligent accident occurred to street car and crew whereby they were delayed and were late at crossing was inadmissible.—*Bergfeld v. Dunham*, 202 S.W. 253.

**App. 1923.** In a passenger's action for injuries sustained in a street car collision, evidence as to what occurred or happened to other persons at the time of the collision was

relevant only to show the force of the collision.—*Davis v. Fleming*, 253 S.W. 798.

**App. 1924.** In an action for injuries by an intending passenger who stepped on a nail in a station platform, evidence that other nails were upon platform when plaintiff received her injury was competent to show that particular nail which caused the injury was located on platform a sufficient length of time for carrier to have had knowledge of its existence.—*Lowther v. St. Louis-San Francisco Ry. Co.*, 261 S.W. 702, 214 Mo. App. 293.

⇐317 (10). Custom or course of business.

**Sup. 1887.** In an action for injuries received from falling over an embankment in attempting to alight from a train, it was not error to admit evidence to prove the usual stopping place of freight trains at the station.—*McGee v. Missouri Pac. Ry. Co.*, 4 S.W. 739, 92 Mo. 208, 1 Am. St. Rep. 706.

Where plaintiff was injured in alighting from a freight train, evidence to show that it was the custom and usage for the freight trains to carry passengers was admissible.—*Id.*

**Sup. 1908.** In an action for injuries, sustained in attempting to board a street car, evidence by the conductor, as to the "usual time" that cars stopped to discharge and receive passengers, was properly excluded.—*Peterson v. Metropolitan St. Ry. Co.*, 111 S.W. 37, 211 Mo. 498.

**App. 1921.** Evidence of deceased's customary route on defendant's street car lines in going to work held admissible.—*Beckner v. Kansas City Rys. Co.*, 232 S.W. 745.

⇐317 (11). Rules of carrier.

**Sup. 1926.** Rules of road held admissible in action against railroad for injuries in wreck to mail clerk as showing want of due care.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

**App. 1926.** Admission in evidence of rules of carrier as to care required of its employees during times of extraordinary rainstorms or high water held not erroneous.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) State ex rel. St. Louis & S. F. R. Co. v. Daues, 290 S.W. 425.

⇐318. — Sufficiency of evidence.

Contributory negligence, see post, ⇐346.

Duty to establish prima facie case, see ante, ⇐316(1).

Evidence making out prima facie case, see ante, ⇐316.

318 (1). In general.

Res ipsa loquitur, see ante, 316(1).

**Sup. 1885.** Where plaintiff was suffering from mental derangement, his testimony as to the circumstances of an injury to him while a passenger *held* to be of such doubtful weight as to warrant the setting aside of a verdict.—*Spohn v. Missouri Pac. Ry. Co.*, 87 Mo. 74.

**Sup. 1909.** Evidence in an action for injuries received while a passenger on an elevator, *held* to support a verdict for plaintiff.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1914.** In an action for damages for the death of a passenger resulting from injuries received in a derailment, evidence *held* sufficient to show that death resulted from such injuries.—*Powell v. Union Pac. R. Co.*, 164 S.W. 628, 255 Mo. 420.

**Sup. 1915.** Plaintiff must fail, if the evidence leaves it to conjecture as to whether the accident was or was not the result of the carrier's negligence.—*Hatchett v. United Rys. Co. of St. Louis*, 175 S.W. 878.

**Sup. 1921.** Evidence *held* to warrant exemplary damages for injury to passenger in elevator.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**Sup. 1922.** In an action for the death of a passenger while riding on railroad, evidence *held* insufficient to show that such passenger had made any fraudulent representations in securing and using a pass.—*McGrath v. Payne*, 245 S.W. 1061.

**App. 1878.** Sufficiency of facts to authorize inference of death of passenger and negligence of driver of omnibus. See *Adams v. St. Louis Transfer Co.*, 5 Mo. App. 593, memorandum.

**App. 1906.** In an action by a passenger on defendant's road for injuries received in a wreck, evidence *held* sufficient to support the charge that the wreck was caused either by defendant maintaining a dangerous track or negligently operating the train.—*Mefford v. Missouri, K. & T. Ry. Co.*, 97 S.W. 602, 121 Mo. App. 647.

**App. 1910.** Liability of a street car company for death of a passenger struck by a car may be shown by circumstantial evidence.—*Richter v. United Rys. Co. of St. Louis*, 129 S.W. 1055, 145 Mo. App. 1.

**App.** Evidence of assault by an employé upon a passenger *held* to sustain a finding

or verdict for plaintiff.—(1910) *Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402; (1914) *Smith v. Delano*, 166 S.W. 852, 179 Mo. App. 242.

**App. 1911.** Evidence in an action for injuries to a passenger alleged to have been caused by specific acts of negligence of the carrier's employes *held* sufficient to show such negligence.—*Pidgeon v. United Rys. Co. of St. Louis*, 133 S.W. 130, 154 Mo. App. 20.

**App. 1912.** Evidence *held* to show that a passenger was injured by the trolley pole.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, 143 S.W. 865, 161 Mo. App. 515.

**App. 1912.** A fact *held* of probative force to show that acts of switchmen were performed while acting in the scope of the employment.—*Richmond v. Missouri Pac. Ry. Co.*, 144 S.W. 168, 162 Mo. App. 422.

**App. 1914.** In an action for the negligent killing of a passenger, evidence *held* to support a verdict for plaintiff.—*Maler v. Metropolitan St. Ry. Co.*, 162 S.W. 1041, 176 Mo. App. 29.

**App. 1914.** Where, in a passenger's action for injuries producing a diseased ovary, there was evidence that such disease could be caused by miscarriage, abortion, and certain infections, but no evidence of any of these, the rule that where an injury may have resulted from one of two causes, for only one of which defendant is liable, plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result did not apply.—*Millirons v. Missouri & K. I. Ry. Co.*, 162 S.W. 1069, 176 Mo. App. 39.

**App. 1915.** Evidence in support of a petition, alleging general negligence causing injury to a street car passenger, *held* to establish a prima facie case.—*Schwandenfeldt v. Metropolitan St. Ry. Co.*, 174 S.W. 143, 187 Mo. App. 588.

**App. 1917.** In suit charging that agent wrongfully insinuated that plaintiff was endeavoring to defraud railway by obtaining ticket without paying therefor, *held*, that the evidence authorized actual and punitive damages.—*Knoell v. Kansas City, C. & St. J. Ry. Co.*, 198 S.W. 79.

**App. 1918.** There being no evidence of length of street car steps from which plaintiff fell on starting of car, and it appearing it moved two or three feet, it cannot be said she was not lying in front of its steps when

it stopped, as she testified.—*Hoffman v. Dunham*, 202 S.W. 429.

**App. 1919.** Evidence held to support a finding that injuries to a passenger were received as a consequence of a jerk of train.—*Burkett v. Missouri Pac. R. Co.*, 208 S.W. 104.

**App. 1919.** Evidence held to sustain finding that cinder which injured plaintiff passenger came from defendant's locomotive, which was passing on another track.—*Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864, 202 Mo. App. 489.

**App. 1921.** In an action for injury to a minor passenger, evidence held to justify the jury's conclusion that a crowd in its rush to get on pushed her under a moving car.—*Grubb v. Kansas City Rys. Co.*, 230 S.W. 675, 207 Mo. App. 16.

In an action by a passenger for injuries resulting from being pushed under a moving car, evidence held to show that the likelihood of a waiting passenger being so pushed by pressure of the crowd struggling to get on the car was a matter reasonably to be anticipated by defendant.—*Id.*

Evidence held sufficient to justify finding that there was a direct causal connection between the negligence of defendant in not protecting a passenger from being crowded under a moving car by fellow passengers struggling to get on and her injury thus received, and also to enable the jury to find with reasonable certainty that her injury was due to such negligence rather than any other cause.—*Id.*

—318(2). As to negligence in respect to condition of carrier's premises.

**Sup. 1918.** Evidence held not to show negligence of carrier in constructing and maintaining its freight yards, where it provided safe place for entering caboose, notwithstanding unsafe place could be used by prospective passenger on freight train.—*Hamilton v. Pryor*, 201 S.W. 550, L. R. A. 1918D, 212.

**Sup. 1923.** In an action for injuries to one falling into an unguarded sluiceway under railroad tracks, beside which he was walking after alighting from a train at a point beyond his station, after dark, evidence held sufficient to establish the railroad's negligence in failing to light the station platform or its surroundings.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1910.** In an action for injuries to one alighting from a train from falling into a hole in a station platform, evidence held insufficient to show that the injury was solely and directly traceable to the accident.—*McClanahan v. St. Louis & S. F. R. Co.*, 126 S.W. 535, 147 Mo. App. 386.

**App. 1914.** Evidence, in an action by one who came to a railroad station to meet a passenger and was injured by leaning against a defective truck, held to support a verdict for plaintiff.—*Stark v. Chicago, R. I. & P. Ry. Co.*, 166 S.W. 850, 179 Mo. App. 225.

—318(3). As to negligence in respect to condition of means of transportation.

**Sup. 1907.** In an action against a street railway for injuries caused plaintiff in leaping from a street car on which an electrical explosion had occurred, evidence held to show previous knowledge by the company of similar explosions attended by such noise and flame as would imperil, excite, and frighten passengers riding where plaintiff rode.—*Williamson v. St. Louis Transit Co.*, 100 S.W. 1072, 202 Mo. 345.

**App. 1900.** Evidence in support of an action against a street car company to recover for injuries received by a passenger who, while standing on the car platform, was injured by the loosening of the "dog" which, in connection with the ratchet wheel, held the brake, allowing the brake handle to swing around and strike plaintiff, examined, and held insufficient.—*Holt v. Southwest Missouri Electric Ry. Co.*, 84 Mo. App. 443.

**App. 1906.** Evidence, in an action for injury to a passenger on a street car, held sufficient to authorize a finding that the accident was caused by the passenger's heel catching on a piece of metal projecting from the step of the car.—*Rattan v. Central Electric Ry. Co.*, 96 S.W. 735, 120 Mo. App. 270.

**App. 1907.** In an action against a street railway for injuries received by plaintiff as a result of stepping on an electrified plate in defendant's car, evidence examined, and held to show that plaintiff was injured as a direct result of the shock.—*McRae v. Metropolitan St. Ry. Co.*, 102 S.W. 1032, 125 Mo. App. 562.

**App. 1910.** Plaintiff, a mail clerk, when he started on his return trip stopped at another mail car to leave some mail with the agent, who observed that he was then in good health. A few minutes later another witness observed him sitting in his compartment with

an expression of pain, and he complained of being hurt. The witness' attention was directed to his left shoe, which showed fresh marks as if something had struck the top of it. The witness then noticed a transom lying on the floor, and saw that a transom was missing from its place. Nothing else in the car was disturbed. When decedent returned home, he limped, and that night the top of his foot was badly swollen. During the night he had a severe chill and another in the morning. The swelling increased in area, and decedent subsequently died of traumatic pneumonia. *Held*, that the evidence was sufficient to show that the fall of the transom was the proximate cause of decedent's injury.—*Dunlap v. Chicago, R. I. & P. Ry. Co.*, 129 S.W. 202, 145 Mo. App. 215.

**App. 1910.** In an action for death of a passenger who fell through the door of an open vestibule on the car in which he was riding, evidence *held* to show negligence in permitting the door to remain open, and that such negligence was the proximate cause of the injuries resulting in his death.—*Johnston v. St. Louis & S. F. R. Co.*, 130 S.W. 413, 150 Mo. App. 304.

**App. 1914.** In a street car passenger's action for injuries, evidence that explosions in the controller might result from a number of unavoidable causes *held* not to overcome the prima facie case made by plaintiff but at most to raise an issue.—*Agnew v. Metropolitan St. Ry. Co.*, 165 S.W. 1110, 178 Mo. App. 119.

**App. 1914.** In an action for personal injuries to a passenger, evidence *held* sufficient to show negligence in not running enough cars, thereby compelling the plaintiff to ride on the running board, and in running the cars at a dangerous speed over a defective track.—*Zwick v. Swinney*, 165 S.W. 1124, 178 Mo. App. 142.

Proof that a street car gave a sudden lurch or dip is sufficient to raise an inference that the track was defective at that point, and that the car should have been run slowly over it.—*Id.*

**App. 1916.** Evidence in a passenger's action for injury *held* not to show how long the banana peel on which she slipped had been in the car, or whether defendant's employes had a reasonable opportunity in which to discover and remove it.—*Tevis v. United Rys. Co. of St. Louis*, 185 S.W. 738.

**App. 1924.** In passenger's action for personal injury, evidence of the sudden jerking

of the car, caused by the breaking of the transom, causing the car to tip to one side, *held* sufficient to make out a prima facie case of defendant's negligence.—*Mulderig v. Wells*, 257 S.W. 1060.

318(4). As to negligence in management of conveyances in general.

**Sup. 1901.** Where, in an action for injuries to a person riding on a freight train, there was a conflict in the evidence as to whether the caboose could have been detached from the train, after the danger was known to defendant, in time to have avoided the injury, and that no attempt was made to do so, though the trainmen were requested by plaintiff and others to attempt to detach it, there was substantial evidence to support a verdict in plaintiff's favor, and hence a finding that defendant failed to use ordinary care will not be reviewed on appeal.—*Merrilees v. Wabash R. Co.*, 63 S.W. 718, 163 Mo. 470.

**Sup. 1907.** In an action for injuries to a passenger, evidence *held* insufficient to show that either the gripman or motorman of the cable train was not at his post of duty.—*Roscoe v. Metropolitan St. Ry. Co.*, 101 S.W. 32, 202 Mo. 576.

**Sup. 1910.** That in an action for injuries by being thrown from a jerk of a cable car, plaintiff testifies that the car stopped and was jerked forward, and then stopped within two feet, which would be impossible, does not show that there was no jerk, since it was merely a matter of opinion, which in his condition he could not have known.—*Setzler v. Metropolitan St. Ry. Co.*, 127 S.W. 1, 227 Mo. 454.

**Sup. 1921.** Premature birth of a child to a passenger suing for injury affords no proof of the violent or unusual movement of the car in which she was riding.—*Elliott v. Chicago, M. & St. P. Ry. Co.*, 236 S.W. 17.

Passenger's testimony that a sudden jolt or jar of the train threw her against the side of a seat, and her grip to the floor, *held* insufficient to show any unusual movement, in absence of corroborative evidence.—*Id.*

**App. 1887.** In an action for injuries to a passenger on a street car, testimony that the driver requested passengers to care for the team while he was collecting fares inside the car warranted the jury in inferring that he apprehended that the place, where the car then was, was not safe to leave the team unattended, and that the car was liable

to become unmanageable.—*Wilkerson v. Corrigan Consol. St. Ry. Co.*, 26 Mo. App. 144.

**App. 1908.** Evidence in an action for injury to a passenger on a freight train *held* not to show that the jolt to which the injury was due was extraordinarily violent.—*Hawk v. Chicago, B. & Q. Ry. Co.*, 108 S.W. 1110, 130 Mo. App. 658.

**App. 1908.** That a jerk given a train on a coupling of cars was extraordinary and unusual tends to prove negligence in operating the train.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

**App. 1909.** In an action by a passenger for injuries caused by shoving a freight car violently against a car in which plaintiff was standing, evidence *held* to make out a prima facie case of negligence by the carrier.—*Gabriel v. St. Louis, I. M. & S. Ry. Co.*, 115 S.W. 3, 135 Mo. App. 222.

**App. 1909.** A passenger, after closing the door to the lavatory, threw her hand up against the side of the lavatory to steady herself, so that her little finger was between the door and the door jamb. At that moment a brakeman came up behind her, opened the door, went in, and closed it. As he opened it, the passenger's finger fell into the crack thus made, and was crushed when the door was closed. *Held* insufficient to show negligence.—*Martin v. Missouri Pac. Ry. Co.*, 119 S.W. 444, 137 Mo. App. 694.

**App. 1910.** In an action for injuries to a passenger in closing the door of the baggage coach, evidence *held* to show that the railroad company required passengers putting on baggage at stations where there was no agent to go to the baggage coach and make arrangements relating to the baggage after boarding the train.—*Creason v. St. Louis, I. M. & S. Ry. Co.*, 130 S.W. 445, 149 Mo. App. 223.

**App. 1910.** In an action for personal injuries to a passenger on a street car, by being violently thrown down by rounding a curve at too high a speed, evidence *held* to support a verdict for plaintiff.—*Witters v. Metropolitan St. Ry. Co.*, 132 S.W. 38, 151 Mo. App. 488.

**App. 1911.** Where, in an action for the death of an elevator passenger caused by the fall of the elevator, the evidence showed that the car was in perfect condition and under complete control of the operator, who stood with his hand on the lever, and that the

elevator could not descend unless the lever was moved, there was evidence justifying the conclusion that the operator voluntarily, or through inattention to duty, moved the lever, thereby causing the elevator to fall, and plaintiff to recover need not produce a witness who saw the operator move the lever.—*Chambers v. Kupper-Benson Hotel Co.*, 134 S.W. 45, 154 Mo. App. 249.

**App. 1911.** In an action for injuries to a passenger on a mixed train, evidence *held* to justify a finding of actionable negligence in coupling cars to the train, authorizing a recovery.—*Allison v. St. Louis & H. Ry. Co.*, 137 S.W. 896, 157 Mo. App. 72.

**App. 1912.** Evidence *held* to sustain a finding that the operator of an elevator was negligent in respect to a child in the car.—*Howard v. Scarritt Estate Co.*, 144 S.W. 185, 161 Mo. App. 552.

**App. 1914.** Evidence in a street car passenger's action for injuries by suddenly starting up the car, *held* to sustain a finding that the car actually stopped just before it was suddenly started up.—*Maier v. Metropolitan St. Ry. Co.*, 162 S.W. 1041, 176 Mo. App. 29.

**App. 1915.** Evidence, in an action for the death of a street car passenger, *held* to show that the car came to a violent stop, and that this was the proximate cause of the injury.—*Allen v. Dunham*, 175 S.W. 135, 188 Mo. App. 193.

**App. 1915.** Evidence *held* to warrant a finding that the train was started with a sudden jerk.—*Thomure v. St. Louis & S. F. R. Co.*, 177 S.W. 708, 191 Mo. App. 640.

**App. 1916.** Passenger's testimony as to sudden slowing down and starting up of train, causing him to trip over a grip obstructing the aisle *held* to justify finding that the slowing down and starting up was violent, extraordinary, and unusual.—*Abernathy v. Lusk*, 182 S.W. 1049.

**App. 1916.** That a street car increased its speed with a jerk while going up a slight incline was sufficient to prove that the operatives did it, and sufficient to prove the specific negligence charged.—*Modrell v. Dunham*, 187 W. 561, 564.

**App. 1916.** Where a passenger coach was severely jerked soon after the train was stopped, *held* that the jury were justified in finding that it was caused by the sudden backing of the forward part of the train.—*Johnson v. St. Louis & S. F. R. Co.*, 190 S.W. 352.

**App. 1917.** Evidence *held* to show that street railway was negligent in carrying passengers upon steps of crowded car in doing which one was injured.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

**App. 1917.** Plaintiff passenger's testimony and that of two other witnesses *held* to sustain verdict that defendant railroad suddenly started its train without stopping at station at which plaintiff expected to alight.—*Patterson v. Lusk*, 196 S.W. 65.

318 (5). As to negligence causing passenger to fall from vehicle.

**Sup. 1886.** In an action against a street railway company for damages for killing plaintiff's minor child, an instruction to the effect that, under the pleadings and evidence, the plaintiff could not recover, was properly refused, when it appears from the evidence that the boy stated that he "fell off the front platform" of defendant's car, and it further appears that the evidence tended to show that there was no gate to keep him from falling off, as required by law, and that the car was going around a curve at a rate of about five miles an hour.—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. 332.

**Sup. 1891.** There was evidence, though conflicting, that while the car was being driven at a dangerous speed it struck an obstruction on the track, and the jolting caused thereby threw plaintiff off and injured him. *Held*, that defendant was not entitled to a nonsuit.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 16 S.W. 500, 106 Mo. 535, judgment affirmed by court in banc 17 S.W. 490, 106 Mo. 535.

**App. 1905.** That a passenger alleged to have been thrown off a street car in consequence of it having been run on a curve toward the west from the north at an excessive rate of speed was found lying 6 feet to the east of the track did not demonstrate that according to the laws of physics she could not have been thrown from the car, but must have stepped off, and a verdict for her would not be set aside as against the physical facts.—*Neumann v. St. Louis Transit Co.*, 90 S.W. 1165, 115 Mo. App. 259.

**App. 1908.** That cars of a freight train were coupled so violently that a passenger sitting on a trunk near a side door of the caboose was thrown through the door to the ground, a water keg in the car was overturned, papers were jarred from the conductor's desk, and a lamp was jarred from its position, etc., warrants a finding that the company was

negligent, though there is no proof of a specific negligent act on the part of those operating the train.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

**App. 1913.** A cause for a prolapsed uterus, the jar from a passenger being thrown from a street car, its appearance immediately thereafter, and her previous freedom therefrom being shown, proof of the cause is not insufficient merely because of the bare possibility that something else might have caused it.—*Stokes v. Metropolitan St. Ry. Co.*, 160 S.W. 46, 173 Mo. App. 676.

**App. 1915.** Evidence *held* to support finding that jolt, which threw passenger from platform of passenger caboose of freight train, was not a usual one incident to the operation of a freight train.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

**App. 1916.** In action against railroad for injuries from being knocked from car platform by sudden jerking, evidence *held* to support plaintiff's verdict.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S.W. 46.

**App. 1920.** In action by street car passenger who was thrown sideways while standing on a rear platform facing to the front, evidence that the passenger attempted to grasp a railing to prevent falling, etc., *held* to sustain a verdict that the fall was caused by a sudden jerk of the car instead of the passenger's fainting, as against the contention that a jerk would necessarily cause a person to fall backwards instead of sideways.—*Jacobs v. Kansas City Rys. Co.*, 217 S.W. 579.

318 (6). As to cause of derailment.

**Sup. 1891.** That a car is going at a dangerous speed and strikes an obstruction, injuring a passenger, is evidence of negligence.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 16 S.W. 500, 106 Mo. 535, judgment affirmed by court in banc 17 S.W. 490, 106 Mo. 535.

**Sup. 1894.** Defendant's train, while going down a grade of 60 feet to the mile, with engine and tender reversed, left the track. The roadbed was old, but had not been used till two months before the accident, when it had been covered with six inches of fresh dirt. The testimony of several railroad men was that there was no curve within a quarter of a mile, and they were supported by the map of the route. Others testified that within 600 yards there was a curve of two feet, and that there was an extra curve of 6 inches

where the train went off. The rate of speed testified to was from 12 to 15 miles an hour, and the highest rate at which, under the circumstances, the train could safely run, was set at from 10 to 15 miles an hour. In an action for the death of passengers, *held*, that the evidence was sufficient to show negligence on the part of the company.—*Berry v. Missouri Pac. Ry. Co.*, 25 S.W. 220, 124 Mo. 223.

**Sup. 1901.** Plaintiff was injured while riding in the caboose of a freight train by its derailment, caused by the falling of a brake attached to the next car in front. The train was running up grade at a speed not as fast as a man could walk, and could have been stopped in 100 feet. The danger was discovered before the train reached a switch, and the conductor said there would be danger of derailing the caboose when the switch was reached. The train was run over 400 feet after it passed the switch before the accident occurred. There was a conflict in the evidence as to whether the conductor gave the engineer a simple stop signal or an emergency signal, but the train did not stop until after the accident. *Held*, that such evidence was sufficient to support a verdict in favor of plaintiff on the theory that the trainmen failed to use ordinary care to prevent the accident after the danger was discovered.—*Merriellees v. Wabash R. Co.*, 63 S.W. 718, 163 Mo. 470.

**Sup. 1903.** Evidence, in an action for injury to a passenger by derailment of a street car, *held* sufficient to authorize the jury to find that the car left the track because of defects in the flange of a wheel, and because the car was run around a curve at the usual rate at which sound cars are run around it.—*Johnson v. St. Louis & S. Ry. Co.*, 73 S.W. 173, 173 Mo. 307.

**Sup. 1913.** A showing that plaintiff was a passenger and that the coach was derailed through defendant's negligence, thereby causing plaintiff to be thrown from his seat and injured, made out a prima facie case so as to require defendant to negative negligence by showing that the derailment was caused by accident, etc.—*Hurck v. Missouri Pac. Ry. Co.*, 158 S.W. 581, 252 Mo. 39.

**App. 1914.** In a street car passenger's action for injuries received in a derailment, evidence *held* to sustain a finding that plaintiff's injuries were proximately caused by the accident.—*Patterson v. Springfield Traction Co.*, 163 S.W. 955, 178 Mo. App. 250.

⇨ 318(7). As to negligence causing collision.

Pleading specific acts of negligence, see ante, ⇨ 315(1).

**Sup. 1909.** In an action for injuries to a passenger in a collision between cable trains, evidence for plaintiff *held* to establish a prima facie case.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

**App. 1904.** In an action against a railroad and a street railroad for injuries sustained while a passenger of the street railroad, resulting from collision with a railroad train at a crossing, evidence *held* sufficient to warrant the finding that the street railroad was not guilty of negligence.—*Snider v. Chicago & A. Ry. Co.*, 83 S.W. 530, 108 Mo. App. 234.

**App. 1907.** In an action against a street railway for injuries received by plaintiff in a collision between the car on which he was a passenger and another car, evidence examined, and *held* sufficient to show that a break in an air brake was caused by the collision and was not the cause thereof.—*Hunt v. Metropolitan St. Ry. Co.*, 103 S.W. 1088, 126 Mo. App. 79.

In an action against a street railway for injuries received by plaintiff in a collision between the car in which he was a passenger and another car, a verdict for defendant *held* against the weight of the evidence.—*Id.*

**App. 1910.** In an action against a street car company for personal injuries to a passenger in a collision between a car and a metal tower near the track, evidence *held* to show that the negligence of defendant's servants after the trailer left the track was the cause of the motor car leaving the track and colliding with the tower.—*Wolven v. Springfield Traction Co.*, 128 S.W. 512, 143 Mo. App. 643.

**App. 1910.** In an action for injuries to a passenger in consequence of the train colliding with a tree on the track, evidence *held* to justify a finding of negligent failure of the carrier to remove the tree standing immediately adjacent to the right of way.—*Rice v. Chicago, B. & Q. Ry. Co.*, 131 S.W. 374, 153 Mo. App. 35.

**App. 1914.** Evidence, in a passenger's action for injuries from being hurled against the back of a seat in an interurban car, *held* to sustain a finding that the diseased condition of plaintiff's ovary was produced by



the blow then received.—*Millirons v. Missouri & K. I. Ry. Co.*, 162 S.W. 1000, 176 Mo. App. 39.

**App. 1921.** Where in action against carrier it is shown that plaintiff was a passenger on a street car, that there was no negligence on his part, and that he was injured by a collision between car and a vehicle, a prima facie case of negligence is made out; the allegations of negligence being in general terms.—*Moran v. Kansas City Rys. Co.*, 232 S.W. 1111.

**App. 1922.** In an action for injuries to a street car passenger thrown against the edges of the seats by the sudden stopping of the car when it struck a truck, evidence held sufficient to prove plaintiff's allegation that the car struck the truck because of defendant's carelessness and negligence.—*Katon v. Kansas City Rys. Co.*, 241 S.W. 983.

**App. 1922.** In an action for injuries to a street car passenger, evidence held to warrant the jury in finding that the motorman was negligent in attempting to pass a wagon which was turning off from the street car track, as a result of which a stake projecting from the rear of the wagon was projected through the window, and injured the plaintiff, notwithstanding that the front end of the car passed the wagon in safety.—*Perkins v. United Rys. Co. of St. Louis*, 243 S.W. 224.

**App. 1924.** In an action against a street car company for injuries to passenger from a collision with a truck, plaintiff's proof of the unusual collision, the carrier's control of the street car, and that plaintiff was without fault made a prima facie case under the doctrine of *res ipsa loquitur*.—*Gibson v. Wells*, 258 S.W. 1.

**App. 1924.** Where the *res ipsa loquitur* rule applies in an action against a carrier for injuries to a passenger, a prima facie case made by plaintiff cannot be destroyed by oral proof tending to show due care by defendant; the sufficiency of such evidence being for the jury.—*Cecil v. Wells*, 259 S.W. 844, 214 Mo. App. 193.

318 (8). As to negligence in taking up passengers in general.

**Sup. 1918.** In an action for personal injuries due to being struck by a street car, evidence held insufficient to prove defendant's custom of stopping its cars without projecting beyond a platform used by passengers for boarding.—*McMiens v. United Rys. Co. of St. Louis*, 202 S.W. 1082, 274 Mo. 326.

**Sup. 1921.** In an action for the death of plaintiff's husband by reason of the negligence of defendant's elevator operator in starting or permitting the elevator to start up while deceased was loading a furnace on it, evidence that, on signal, the operator brought the elevator to the desired point and assured deceased it was all right to load the furnace held insufficient to prove that the sudden starting of the elevator was caused by the operator's negligent act or want of action.—*Grimm v. Globe Printing Co.*, 232 S.W. 676.

**App. 1904.** In an action against a street railway for injuries to a passenger while boarding the car, caused by its sudden jerk, evidence held sufficient to establish a prima facie case.—*Stoddard v. St. Louis & M. R. R. Co.*, 80 S.W. 33, 105 Mo. App. 512.

**App. 1905.** In an action against a street car company for injuries received by a passenger while attempting to board a car, plaintiff testified that he was thrown 10 feet by the movement of the car on it starting while he was boarding it. The conductor testified that plaintiff was dragged along some distance and thrown to the ground. Other witnesses showed that he was not thrown 10 feet. Held, that the verdict for plaintiff would not be reversed because his testimony was contradicted by physical facts based on the improbability that a car could start from a motionless state with such violence as to throw a person in the act of stepping on it 10 feet away.—*Schmitt v. St. Louis Transit Co.*, 90 S.W. 421, 115 Mo. App. 445.

Evidence, in an action against a street car company for injuries received by a passenger while boarding a car, in consequence of the premature starting of the car, held sufficient to justify a finding that the company was guilty of actionable negligence.—*Id.*

**App. 1909.** Evidence held to show that a carrier expressly or impliedly invited passengers to board its train while being made up.—*Wise v. Wabash R. Co.*, 115 S.W. 452, 135 Mo. App. 230.

**App. 1910.** In an action for injuries to one accompanying a shipment of stock by being jerked from the train on attempting to board it while moving, evidence held not to show that there was any unusual jerk not incident to the operation of the train, the risk of injury from which plaintiff did not assume.—*Ray v. Chicago, B. & Q. Ry. Co.*, 126 S.W. 543, 147 Mo. App. 332.

**App. 1913.** Evidence, in an action against a street car company for suddenly starting the car while plaintiff was attempting to board, *held* to show negligence of the conductor in so starting the car.—*Fields v. Metropolitan St. Ry. Co.*, 155 S.W. 845, 169 Mo. App. 624.

**App. 1914.** Testimony that, by sudden starting of east-bound car, plaintiff, who was on the step, was thrown to street, with his head to east and his feet to west, *held* not to support verdict for plaintiff.—*Daniels v. Kansas City Elevated Ry. Co.*, 164 S.W. 154. See Evidence, ← 588 in this Digest.

**App. 1914.** Evidence *held* insufficient to show that the motorman knew of or could have anticipated the presence of plaintiff's husband, attempting to board the car while it was in motion; hence the motorman was not guilty of negligence in suddenly accelerating the car's speed.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

**App. 1919.** In passenger's action for injuries by violent jerk of train while boarding and as he was about to step on platform, evidence *held* to show negligence on the part of defendant.—*Burkett v. Missouri Pac. R. Co.*, 208 S.W. 104.

**App. 1919.** In an action against a street railway for injuries to an intending passenger while attempting to board a car at other than a regular stopping place, evidence *held* sufficient to establish a prima facie case for plaintiff.—*Elliott v. United Rys. Co. of St. Louis*, 214 S.W. 234, 201 Mo. App. 662.

**App. 1919.** In an action against a street car company for personal injuries to a passenger received while boarding a car, evidence of disinterested witnesses *held* sufficient to support the verdict of the jury accepting plaintiff's version of the accident and injury.—*Baldwin v. Kansas City Rys. Co.*, 214 S.W. 274.

← 318(9). As to negligence in getting down passengers in general.

**Sup. 1890.** In an action for injuries received in getting off a moving cable car, by a car passing on another track, evidence that the cars were running at a higher rate of speed than was authorized by city ordinances, coupled with some evidence that the bell on the passing car was not rung is sufficient to show negligence of defendant.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.W. 804, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541, re-

hearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

**Sup. 1892.** It appeared that after the train started plaintiff was informed by the conductor that the train did not stop at the place of her destination, and that she would have to get off at the preceding station. One of plaintiff's witnesses testified that a male passenger, who had intruded his attentions on plaintiff, afterwards had a conversation with the negro porter, and gave him half a dollar, when the negro started out at the back of the car, saying: "This train does not stop at all stations." This witness also testified that she saw the male passenger and the conductor talk together twice, but this was shown to have been in plaintiff's presence, who was endeavoring to persuade the conductor to let her off at her destination. When the train slowed up at the preceding station, the conductor informed plaintiff that she would have to get off there, and the male passenger then offered to conduct her to an hotel where he boarded. *Held*, that the evidence was not sufficient to establish plaintiff's claim that while she was a passenger on defendant's train a conspiracy was formed between the male passenger, the conductor, and the porter to place plaintiff in the male passenger's power, to enable him to ravish her.—*Sira v. Wabash Ry. Co.*, 21 S.W. 905, 115 Mo. 127, 37 Am. St. Rep. 386.

**Sup. 1923.** In an action for injuries to one falling into an unguarded sluiceway under railroad track, beside which he was walking after alighting from a train at a point beyond his station after dark, evidence *held* sufficient to establish the railroad's negligence in failing to light the station platform or its surroundings, carrying plaintiff beyond it, inviting him to alight in an unfamiliar place in the darkness, and failing to give him any warning or instructions.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

**App. 1910.** In an action by passenger injured alighting from a train by its jerking, evidence that he was a passenger on the train alleged, and was injured as claimed, *held* to support a verdict for plaintiff.—*Stakebake v. Union Pac. R. Co.*, 185 S.W. 1166.

**App. 1919.** In an action by a crippled passenger against a railroad company for injuries incurred when compelled to alight from a passenger coach without assistance, evidence *held* to show that defendant's servants knew that the passenger was crippled,

old, and infirm and needed assistance.—*Turner v. Wabash R. Co.*, 211 S.W. 101.

**App. 1922.** In action for injuries while alighting from a street car, the step of which was raised and lowered with the closing and opening of the doors by the conductor, plaintiff's evidence *held* sufficient to authorize a finding that defendant raised the step before plaintiff reached a position of safety.—*McCormack v. United Rys. Co. of St. Louis*, 238 S.W. 579.

**App. 1923.** In action for injuries to passenger, falling into unguarded sluiceway under railroad track, beside which he was walking after alighting from a train, at a point beyond his station after dark, evidence *held* sufficient to establish negligence in carrying him past his destination and permitting him to alight in darkness in place surrounded by dangerous pitfalls.—*Copeland v. Davis*, 253 S.W. 427.

**App. 1926.** In passenger's action for injuries when thrown from street car to street while alighting, due to sudden stopping of car, evidence *held* to sustain verdict for plaintiff.—*Goodwin v. Wells*, 285 S.W. 112, 220 Mo. App. 1.

318 (10). As to negligence in starting car before passenger has alighted or while he is alighting.

**Sup. 1908.** Evidence *held* sufficient to show that death of a passenger was caused by injury received while attempting to alight from a street car, which was negligently started up while he was doing so.—*Millar v. St. Louis Transit Co.*, 114 S.W. 945, 215 Mo. 607.

**Sup. 1922.** In a passenger's action against a street railway company for injuries sustained through being thrown through open gates by a violent jerk of the car while he was alighting, evidence for plaintiff *held* sufficient to take the case to the jury.—*Keppler v. Wells*, 238 S.W. 425.

**Sup. 1928.** Passenger proving elevator moved while alighting, causing fall, established prima facie case requiring defendant to rebut negligence inferred.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**App. 1891.** Where a passenger's version of the accident is opposed by the testimony of five eyewitnesses, a verdict in his favor will be set aside.—*Empey v. Grand Ave. Cable Co.*, 45 Mo. App. 422.

**App. 1905.** In an action for injuries to a passenger on a street car by the premature starting thereof as she was attempting to alight, plaintiff's evidence *held* sufficient to make out a prima facie case.—*Cramer v. Springfield Traction Co.*, 87 S.W. 24, 112 Mo. App. 350.

**App. 1905.** In an action for injuries to a passenger on a freight train, preparing to alight therefrom, testimony that the "train made a heave forward just like lightning," that "it was an awful hard jerk," and that "the jerk was the most severe I had ever experienced," is valueless as evidence, and does not prove that the jerk resulted from negligence.—(1904) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, judgment affirmed 88 S.W. 767, 113 Mo. App. 636.

**App. 1907.** In an action for injuries caused by a fall from a street car step, evidence examined, and *held* to sustain a verdict for plaintiff, based on the theory that plaintiff was thrown from the car step by the act of defendant's servants in starting the car before she had alighted.—*Kupke v. St. Louis Transit Co.*, 99 S.W. 472, 122 Mo. App. 355.

**App. 1908.** In an action for injuries to a street car passenger by the premature starting of a car from which he was endeavoring to alight, evidence *held* to warrant a finding that defendant was negligent in prematurely starting the same at the time of the injury.—*Black v. Metropolitan St. Ry. Co.*, 109 S.W. 86, 130 Mo. App. 548.

**App. 1908.** In an action against a carrier for injuries received by plaintiff while alighting, evidence that the train was at a stand when plaintiff started to alight *held* sufficient to support a verdict for the plaintiff.—*Saeger v. Wabash R. Co.*, 110 S.W. 686, 131 Mo. App. 282.

**App. 1913.** In action for injuries to female passenger, evidence that she was thrown to street by sudden starting of street car as she was alighting *held* not so contrary to physical facts as to prevent recovery.—*Klass v. Metropolitan St. Ry. Co.*, 155 S.W. 57. See Evidence, 588 in this Digest.

**App. 1920.** Where testimony showed that street car had slowed down for the purpose of permitting passenger to alight, and conductor had opened the vestibule door for such purpose, and plaintiff had proceeded to the edge of the platform and had taken hold of a railing and was leaning forward pre-

paratory to alighting, it cannot be said that proof did not show that he was in the act of alighting from the car at the time it was jerked, as alleged in the petition.—*Roach v. Kansas City Rys. Co.*, 228 S.W. 520.

**App. 1921.** In suit for injury to an alighting passenger, evidence *held* to show that a street car was started before she had a reasonable time and opportunity to alight.—*Hartweg v. Kansas City Rys. Co.*, 231 S.W. 269.

**App. 1921.** In an action against a street railway for injuries to alighting passenger, in which it was claimed that the car employés were negligent in prematurely starting the car, evidence *held* to sustain verdict for plaintiff.—*Huntington v. Kansas City Rys. Co.*, 233 S.W. 95.

**App. 1926.** Proof of sudden jerk of street car permits inference that it was caused by motorman, where there is no other probable agency to which to attribute such starting.—*Lammert v. Wells*, 282 S.W. 487.

☞318 (11). As to negligence in failing to provide safe place for getting down passenger.

**Sup. 1915.** In an action for wrongful death of a caretaker of stock, caused by stepping off a caboose and falling from a trestle, evidence *held* to sustain a finding that defendant was negligent in failing to give warning that the train had been moved to the trestle.—*Miller v. Southern Pac. Co.*, 178 S.W. 885, 266 Mo. 19.

**App. 1901.** In an action against a street railroad company for personal injuries sustained by a passenger who, as she was crossing the tracks after leaving a car, was struck by a car coming from an opposite direction, the facts as detailed by plaintiff were susceptible of only two constructions with reference to her conduct at the time she crossed the track; either she failed to look down the track, which was level and straight for a quarter of a mile, and hence did not see an incoming car, or, if she looked at all before making the crossing, the approaching car had got so close that it shut off her vision of the car on the parallel track, which she had just left, wherefore she mistook the coming for the departing car, and so ventured on its tracks. *Held*, that on neither hypothesis could negligence be imputed to defendant, unless it was shown that proper effort was not made to check the speed of the car after plaintiff's peril was discovered, and, there being no evidence that such was the case, the

accident must be regarded, so far as it concerned defendant, as a mere mishap, free from negligence on its part, for which no cause of action could arise.—*Hanselman v. St. Louis & M. R. R. Co.*, 88 Mo. App. 123.

**App. 1917.** Evidence *held* to sustain findings that street railroad company was negligent in using a stopping place for discharge of its passengers which was not reasonably safe.—*Ganahl v. United Rys. Co. of St. Louis*, 197 S.W. 159, 197 Mo. App. 495.

☞318 (12). As to companies or persons liable for injuries.

**App. 1883.** Where plaintiff's intestate was killed, while a passenger on defendant's street car, by reason of a derrick, used by a contractor on the side of the track, falling on the car as the car caught the guy rope, and that the guy rope was low enough to be struck by a passing car of customary height, and the car driver testified that he was looking away from the rope when he drove up to it, the jury were warranted in finding that the street car company and the contractor were guilty of negligence, though there was proof that defendants had left nothing undone which extreme prudence could suggest.—*Hunt v. Missouri R. Co.*, 14 Mo. App. 160.

**App. 1908.** In an action for injuries to a street car passenger by the premature starting of a car from which he was endeavoring to alight, evidence *held* to warrant a finding that defendant was operating the car.—*Black v. Metropolitan St. Ry. Co.*, 109 S.W. 86, 130 Mo. App. 548.

**App. 1911.** In an action for injuries to a passenger while attempting to board a street car, slight evidence in support of the allegations as to defendant's ownership or operation of the car at the time of the injury is sufficient where it is not combated, and, except for the general denial, there is no intimation that defendant resists the claim on the ground that it was not the operator of the car.—*Reisenleiter v. United Rys. Co. of St. Louis*, 134 S.W. 11, 155 Mo. App. 89.

**App. 1914.** In a street car passenger's action for injuries, evidence *held* sufficient to show that defendant owned or was operating the car upon which plaintiff was a passenger.—*Agnew v. Metropolitan St. Ry. Co.*, 165 S.W. 1110, 178 Mo. App. 119.

Slight evidence of defendant's ownership or operation of car upon which plaintiff was a passenger when injured *held* sufficient

where this was alleged and treated as proved.—*Id.*

**App. 1917.** In action for assault on passenger by motorman and conductor of street car, evidence *held* sufficient to sustain finding that defendant street railway company owned and operated car.—*Olive v. United Rys. Co. of St. Louis*, 193 S.W. 32, 197 Mo. App. 118.

**App. 1919.** In a passenger's action for personal injuries received by the derailment of a street car wherein she was riding, evidence *held* to sustain a finding that defendant operated the car in question.—*Watkins v. Kansas City & W. B. R. Co.*, 209 S.W. 950.

**App. 1922.** Evidence *held* sufficient to show that, at the time of the injury to a passenger in a taxicab on her return from a funeral, the chauffeur was under control of defendant taxicab company, and engaged in its business.—*Burke v. Shaw Transfer Co.*, 243 S.W. 449, 211 Mo. App. 353. *certiorari* quashed (Sup. 1923) *State ex rel. Shaw Transfer Co. v. Trimble*, 250 S.W. 384.

**App. 1924.** In action for injuries to passenger of street car, conduct of case by corporation's attorney *held* to concede company's ownership of car.—*Lucius v. Wells*, 263 S.W. 546.

### 318 (13). Limitation of liability.

**App. 1926.** That defendant's agent called shipper's contract containing a caretaker's contract a bill of lading and plaintiff signed it *held* not to show fraud.—*Edmondson v. Missouri Pac. R. Co.*, 286 S.W. 439, 220 Mo. App. 294.

### 319. — Damages.

Instructions, see post, 321.  
Questions for jury, see post, 320.

#### 319 (1). Elements of damage for assault or insulting language by employe or fellow passengers.

**Sup. 1893.** In an action by a passenger against a carrier for personal injuries, plaintiff's evidence tended to show that threats of personal violence by the conductor and others induced him to jump from the train. *Held*, that an instruction that plaintiff could recover damages for threats, whether any injury resulted therefrom or not, and that plaintiff could recover for mental anguish unattended by physical injury, was erroneous.—*Spohn v. Missouri Pac. Ry. Co.*, 22 S.W. 690, 116 Mo. 617.

**App. 1884.** Character of carrier's servants as mitigatory of damages. See *Hayes*

*v. St. Louis R. Co.*, 15 Mo. App. 584, memorandum.

**App. 1885.** A passenger, assaulted by the conductor, may recover for consequent mental suffering.—*Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609.

**App. 1903.** Mere words, unaccompanied by any bodily injury, are not the subject of damages, except in actions of libel and slander, and hence plaintiff could not recover of a carrier for mental anguish or shame caused by words addressed to him, while a passenger, by the conductor on one of the defendant's cars.—*Grayson v. St. Louis Transit Co.*, 71 S.W. 730, 100 Mo. App. 60.

**App. 1904.** Where a passenger on a street car was wilfully assaulted by the conductor, he was entitled to recover not only for physical injuries sustained, but for pain and suffering, and for the disgrace and humiliation he was subjected to by reason of the assault.—*O'Donnel v. St. Louis Transit Co.*, 80 S.W. 315, 107 Mo. App. 34.

**App. 1909.** A passenger misled to alight at night in ditch beside a track, containing water, was entitled to have jury consider place where she alighted, condition of weather, and sickness and suffering, caused thereby.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497. See *Carriers*, 277(1) in this Digest.

**App. 1914.** Assaults on a passenger being at a public place, the jury may consider plaintiff's wounded feelings, humiliation, and disgrace as elements of actual damages.—*Winston v. Lusk*, 172 S.W. 76, 186 Mo. App. 381.

**App. 1917.** The rule precluding recovery for mental shock alone does not preclude a passenger from recovering for an assault, where the conductor before stopping the train has taken hold of her to eject her for failure to pay her fare.—*Briggs v. Lusk*, 190 S.W. 380.

#### 319 (2). Exemplary damages.

**Sup. 1860.** Where plaintiff went on board a steamboat, and, while transacting business with the boat, was taken off to a landing below, against his remonstrance, if the master of the boat could have caused him to be landed at any point easy of access between the places where he was taken off and where he was finally landed, but maliciously or wantonly and wrongfully refused so to do, plaintiff was entitled to such damages as would be reasonable punishment for such

malicious conduct.—*Stoneselfer v. Sheble*, 31 Mo. 243.

**Sup. 1867.** In an action against a street-railway company for damages for an injury suffered by a passenger, an instruction that, "if the negligence of the driver was gross, the jury should find exemplary damages, in their discretion, beyond the actual injury sustained, for the sake of the example and punishment for such gross negligence," is erroneous.—*McKeon v. Citizens' Ry. Co.*, 42 Mo. 79.

**Sup. 1904.** Where a street car conductor kicked plaintiff, a messenger boy 13 years of age, over the heart as he was boarding the car as a passenger and plaintiff was only prevented from falling from the car while it was moving by the acts of other passengers in drawing him into the car, such facts justified the recovery of exemplary damages in an action against the carrier.—*McNamara v. St. Louis Transit Co.*, 81 S.W. 880, 182 Mo. 676, 66 L. R. A. 486.

**Sup. 1921.** Where an elevator was in charge of the engineer of a large building, to whom the suggestions of the inspector were referred, the owner's liability for exemplary damages for injury to a passenger was determinable by the conduct of the engineer.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**App. 1910.** Where, in an action for injuries to a passenger by assault committed by defendant's motorman, plaintiff's evidence showed that the assault was without provocation and aggravated, plaintiff was entitled to recover punitive damages.—*Shelby v. Metropolitan St. Ry. Co.*, 125 S.W. 1189, 141 Mo. App. 514.

**App. 1910.** Where the jury were justified in finding that a street car conductor followed a passenger to the steps of a car and struck him with a switch iron while he was in the act of alighting, a proper case for exemplary damages is made out, as such action evinces malice.—*Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402.

**App. 1920.** An action against a street railroad company for unprovoked assault by its servant is one where punitive damages may be allowed.—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo. App. 262.

#### ←319(3). Excessive damages.

**Sup. 1889.** Where a passenger on a railroad train was permanently injured, it was *held* that, though a verdict of \$9,000 was large, yet passion, etc., could not be inferred

from that, and there was no ground for reversal for excessive damages.—*Griffith v. Missouri Pac. R. Co.*, 11 S.W. 559, 98 Mo. 168.

**Sup. 1904.** Where a street car conductor kicked plaintiff, a messenger boy 13 years old, over the heart as he was attempting to board defendant's street car as a passenger, and it appeared that the kick produced a bruise and caused plaintiff severe pain, a verdict in favor of plaintiff for \$750 punitive damages was not excessive.—*McNamara v. St. Louis Transit Co.*, 81 S.W. 880, 182 Mo. 676, 66 L. R. A. 486.

Where a street car conductor kicked plaintiff, a messenger boy 13 years of age, over the heart, as he was attempting to board defendant's street car as a passenger, and it appeared that the kick produced a bruise and caused plaintiff severe pain, a verdict in favor of plaintiff for \$250 actual damages was not excessive.—*Id.*

**App. 1903.** A conductor on a street car ordered the arrest of a passenger by a policeman, and he was taken to the station, and, to regain his liberty, was compelled to enter into a recognizance for his appearance on the following day. No one appeared to prosecute him at that time, and, after hearing his statement and the evidence of the policeman, the justice discharged him. *Held*, that \$1,450 actual damages was excessive, and unless \$950 was remitted, the judgment would be reversed.—*Grayson v. St. Louis Transit Co.*, 71 S.W. 730, 100 Mo. App. 60.

**App. 1904.** Where plaintiff, a passenger on a street car, was willfully assaulted by the conductor, who kicked plaintiff in the mouth and face and knocked out three of his teeth, a verdict in favor of plaintiff for \$1,000 was not excessive.—*O'Donnel v. St. Louis Transit Co.*, 80 S.W. 315, 107 Mo. App. 34.

**App. 1904.** Where a conductor of a street car declined to accept from a passenger a transfer check, and demanded fare, and forcibly resisted his efforts to leave the car, detaining him while the car journeyed several miles, and threatening to take him to a police station, though he explained the conditions under which he received the check from a conductor on another line, a verdict for \$25 compensatory damages and \$500 for punitive damages was not so excessive as to warrant the court on appeal in interfering with the refusal of the trial court to set it aside.—*Mueller v. St. Louis Transit Co.*, 83 S.W. 270, 108 Mo. App. 325.

**App. 1907.** Where a street car passenger applied to the conductor an insulting epithet, tending to arouse his passions, provoking the conductor to strike him, and his injury was slight, not being entitled to punitive damages, a verdict for \$1,000 was excessive.—*Mitchell v. United Railways Co.*, 102 S.W. 661, 125 Mo. App. 1.

**App. 1910.** Where a passenger, assaulted by a conductor with a switch iron, received a scalp wound about three inches long that laid bare his skull, and his skull was fractured, resulting in a blood tumor in the eye, in the loss of his memory, and a change of his disposition, and his injuries were permanent, and the assault was vicious and unprovoked, a verdict of \$5,000 compensatory damages and \$2,000 exemplary damages, is not excessive.—*Neuer v. Metropolitan St. Ry. Co.*, 127 S.W. 669, 143 Mo. App. 402.

**App. 1910.** Fifty dollars is not excessive recovery by a railway passenger for actual damages in being cursed and kicked in the mouth by a brakeman.—*Cuthey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

A carrier being liable in exemplary damages for torts by its employes upon passengers, involving both insult and injury, recovery by a railway passenger of \$450 exemplary damages was not excessive, where a brakeman wrongfully and maliciously assaulted a passenger, kicking him in the mouth and cursing him.—*Id.*

**App. 1911.** Plaintiff, a street car passenger, on being informed by the conductor before reaching his destination that he must leave the car at the car barn, asked for a transfer, and, not getting it, repeated the request, and remained on the car until after it had started for the barn. The conductor grew angry at plaintiff for not leaving the car, swore at him, and struck him in the face with an iron switch bar, and it was the opinion of plaintiff's physician that the cheek bone was fractured. Plaintiff was incapacitated for two weeks, suffered great pain, and was disfigured by a scar left by the wound. He brought suit for damages only for his pain and suffering and for punitive damages. The jury awarded \$1,000 actual and \$2,000 punitive damages, and the trial court, thinking the punitive damages excessive did not overrule the motion for new trial until plaintiff entered a remittitur of \$1,250 thereof. *Held*, that the damages, both compensatory and punitive, were not excessive, under the

rule that punitive damages are given as a punishment, as an example to the defendant, and as a warning to others.—*Mills v. Metropolitan St. Ry. Co.*, 137 S.W. 1006, 157 Mo. App. 529.

**App. 1912.** A verdict awarding \$500 actual and \$2,500 punitive damages for an unwarranted assault on a person at a station to purchase a ticket was not excessive.—*Hedge v. St. Louis & S. F. R. Co.*, 145 S.W. 115, 164 Mo. App. 291.

**App. 1914.** Facts in a railroad passenger's action for personal injuries caused by an assault by the porter *held* not to show that an award of \$500 actual damages and \$500 punitive damages was excessive.—*Smith v. Delano*, 166 S.W. 852, 179 Mo. App. 242.

**App. 1914.** In an action for injuries to a youth assaulted by defendants' railroad ticket agent, a verdict allowing plaintiff \$1,000 actual damages and \$500 punitive damages, *held* excessive, and should be reduced to \$500 actual damages and \$500 punitive damages.—*Bledsoe v. West*, 171 S.W. 622, 186 Mo. App. 460.

**App. 1914.** A brakeman's assault on a passenger being peculiarly unwarranted and made for revenge only, an award of \$700 punitive damages will not work a reversal.—*Winston v. Lusk*, 172 S.W. 76, 186 Mo. App. 381.

**App. 1917.** A recovery of \$1,500 punitive damages, in addition to \$500 compensatory damages for a wanton and lustful assault committed by a conductor on a female passenger, *held* not excessive.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S.W. 371.

**App. 1917.** A passenger's recovery of \$750 for an assault by conductor in dispute over payment of extra fare *held* excessive above \$500.—*Briggs v. Lusk*, 190 S.W. 380.

**App. 1917.** Two dollars actual and \$498 punitive damages for insulting insinuation that plaintiff was attempting to obtain ticket without paying *held* not excessive.—*Knoell v. Kansas City, C. & St. J. Ry. Co.*, 198 S.W. 79.

**App. 1920.** Where a young woman, passenger on a street car, was thrown with great force to the pavement and rendered unconscious when a collision occurred, and her right collar bone was broken, with resultant impairment of the use of her right arm, and both sides of her head were bruised, such injuries and other strains keeping her in a

hospital for two weeks and causing loss of weight and a nervous condition, an award of \$3,000 cannot be deemed excessive, in view of the diminished purchasing power of money; it appearing the young woman was a stenographer employed at \$16 per week.—*Lowder v. Kansas City Rys. Co.*, 221 S.W. 800.

**App. 1920.** Where plaintiff, thrown down by the jerk of a street car, broke her arm and sustained other bruises and injuries and suffered much pain and was in bed nearly four weeks attended by physicians and a nurse, a verdict of \$1,500 was not excessive.—*Fletcher v. Kansas City Rys. Co.*, 221 S.W. 1070.

**App. 1920.** Where plaintiff, an elderly man, was assaulted by a carrier's employé, struck on the head, rendered unconscious, his nose broken, his face and head bruised, and he afterwards suffered from dizziness and nervousness, and his eyes were injured, a verdict for \$4,500 actual damages and \$1,000 punitive damages *held* not excessive.—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo. App. 262.

**App. 1923.** \$2,500 punitive damages for an assault with an iron bar, by a street car conductor on a passenger, being five times the amount of the compensatory damages allowed, was excessive.—*Hunter v. Kansas City Rys. Co.*, 248 S.W. 998, 213 Mo. App. 233.

### —320. — Questions for jury.

Contributory negligence, see post, —347.

#### —320 (1). In general.

In an action for injuries to passenger, evidence *held* sufficient to carry the question of defendant's negligence to the jury.

—**Sup. 1907.** *Schloemer v. St. Louis Transit Co.*, 102 S.W. 565, 204 Mo. 99;

**App. 1908.** *Vessels v. Metropolitan St. Ry. Co.*, 108 S.W. 578, 129 Mo. App. 708.

**Sup. 1926.** Negligence of railroad in train wreck, causing injury to mail clerk, as to maintenance of bridge and operation of train, *held* for jury.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

**App. 1907.** Where, in an action for injuries to a passenger on a freight train, the manner of injury, while not what might have been expected, was not incredible, it was a question for the jury.—*Russell v. Quincy, O. & K. C. R. Co.*, 102 S.W. 613, 125 Mo. App. 441.

**App. 1910.** Evidence in an action against a carrier *held* sufficient to support

the allegations of negligence in the complaint as against a demurrer to the evidence.—*Ingles v. Metropolitan St. Ry. Co.*, 129 S.W. 493, 145 Mo. App. 241.

**App. 1913.** Where street car passenger's testimony was contradictory as to whether the accident occurred as alleged or in some other way, it was a question for the jury which version was correct, and the direction of a verdict for defendant on the ground of variance was improper.—*Bobblitt v. United Rys. Co. of St. Louis*, 153 S.W. 70, 169 Mo. App. 424.

**App. 1915.** An inference that a street car passenger was in danger or had reason to apprehend danger *held* justifiable so that a carrier was not entitled to a directed verdict.—*Moore v. Metropolitan St. Ry. Co.*, 176 S.W. 1120, 189 Mo. App. 555.

**App. 1917.** In action by passenger on street car for injuries sustained in alighting, *held* that evidence as to defendant's ownership was insufficient to carry case to jury.—*Lackland v. United Rys. Co. of St. Louis*, 191 S.W. 1104, 197 Mo. App. 62.

**App. 1926.** Evidence that agent called shipper's contract a bill of lading, and that if plaintiff, who could not read, had known contents he would not have signed, *held* insufficient to take question of fraud to jury.—*Edmondson v. Missouri Pac. R. Co.*, 286 S.W. 439, 220 Mo. App. 294.

#### —320 (2). Existence of relation of carrier and passenger.

**Sup. 1906.** Where, in an action against a railroad for wrongful death, it appeared that deceased, after reaching the point on defendant's line to which he had purchased a ticket, remained in the coach; that the residence of himself and family was at a station further along the road; and that, at the time of the collision causing his death, defendant's train had started—it was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision, or that it was his purpose to continue his journey.—*Anderson v. Missouri Pac. Ry. Co.*, 93 S.W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

**App. 1910.** In an action against a railway for an assault upon a passenger by a brakeman *held*, under the evidence, a jury question, whether the passenger forfeited his rights as a passenger and became a trespasser



through misconduct.—*Cathey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

**App. 1915.** Whether a person has undertaken to travel in a conveyance provided by a carrier, and whether he has been accepted as a passenger by the carrier, are ordinarily questions for the jury.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 270.

**App. 1927.** Whether one struck by automobile while crossing viaduct to board waiting street car after leaving car at opposite end was passenger *held* for jury.—*Watts v. Fleming*, 298 S.W. 107, 221 Mo. App. 1123.

320 (3). Care as to children and others under disability.

**Sup. 1912.** Whether a woman of 57 years, weighing nearly 200 pounds, facing forward while entering a street car from the platform, could have been thrown forward by the sudden starting of the car was for the jury.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

Whether defendant was negligent in starting its car, so as to injure plaintiff, a woman of 57 years, weighing nearly 200 pounds, as she was making her way toward a seat, was for the jury.—*Id.*

320 (4). Acts or omissions of carrier's employes.

**Sup. 1895.** In an action by a passenger to recover damages for injuries received by jumping from a moving train, under direction of the brakeman, where plaintiff and two witnesses testified that the brakeman was stationed at the brake in the car, though his back was turned toward them, and though they are contradicted by the brakeman himself and three witnesses for defendant, who were in full view of the face of the man at the brake and whose testimony is corroborated by other circumstances, the identity of the man at the brake is for the jury.—*McPeak v. Missouri Pac. Ry. Co.*, 30 S.W. 170, 128 Mo. 617.

**App. 1910.** In an action by a street car passenger for an assault by the conductor, evidence *held* to authorize the submission to the jury of the question of punitive damages.—*Kelleher v. United Rys. Co. of St. Louis*, 126 S.W. 796, 147 Mo. App. 553.

**App. 1912.** In an action against a railway company for damages for an assault of its conductor upon a passenger, evidence of the carrier's defense *held* to make the question of defendant's justification one for the

jury.—*Hancock v. Missouri & K. Interurban Ry. Co.*, 146 S.W. 807, 163 Mo. App. 259.

**App. 1914.** Whether the brakeman was the aggressor and the assaulted passenger acted only in self-defense *held* for the jury.—*Winston v. Lusk*, 172 S.W. 70, 186 Mo. App. 381.

**App. 1915.** In an action by a passenger injured when a porter suddenly opened the door of the toilet room in a car, the question of the porter's excessive violence *held* for the jury.—*Ward v. Kansas City Southern Ry. Co.*, 175 S.W. 296, 189 Mo. App. 305.

**App. 1915.** In action for injuries to street car passenger, crowded from vestibule of car, whether the person who crowded her was the conductor *held* for the jury under the evidence.—*Tanchof v. Metropolitan St. Ry. Co.*, 177 S.W. 813.

**App. 1917.** Where the evidence in a passenger's action for an assault by a conductor was conflicting, defendant's demurrer thereto was properly overruled.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S.W. 371.

**App. 1920.** In an action against a street railway company for assault by its servants while plaintiff was attempting to become its passenger, evidence *held* to present a case for the jury.—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo. App. 262.

**App. 1921.** In an action against a street railway for damages for assault by servants on intending passenger, evidence *held* ample to send the case to the jury on the question of whether the men were acting within the scope of their employment, or whether they had turned aside from their master's duty to do something on their own account.—*Sturgis v. Kansas City Rys. Co.*, 228 S.W. 861.

320 (5). Number and efficiency of employes.

See explanation, page iii.

320 (6). Acts of fellow passengers or other third persons.

**Sup. 1907.** Where a street car passenger was injured by the derailment of the car caused by a brick placed on the track by a boy some forty or fifty feet in front of the car, whether the motorman by the exercise of reasonable diligence could have seen the brick placed on the track, or could have seen it after it had been placed there for a sufficient length of time to have permitted him, with the means and appliances at his command, to stop the car, was for the jury.—

**O'Gara v. St. Louis Transit Co.**, 103 S.W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

**App. 1920.** In an action by a passenger for damages for insult and assault suffered at the hands of intoxicated passengers, whether the trainmen knew, or by the exercise of a high degree of care might have known, that the intoxicated passengers would shove another passenger against plaintiff and injure her, *held* for the jury, since the assault was such as would likely accompany rude and boisterous drunken men in a crowded car.—**Abernathy v. Missouri Pac. R. Co.**, 217 S.W. 568.

**App. 1921.** In an action by a passenger who was kissed by an intoxicated fellow passenger on a street car, whether the conductor had reasonable grounds for anticipating that the intoxicated passenger would assault plaintiff and kiss her *held* for the jury.—**Liljegren v. United Rys. Co. of St. Louis**, 227 S.W. 925.

**App. 1921.** In an action by a negress against a carrier for damages for permitting her to ride in a street car into the city of East St. Louis at the time a mob was attacking negroes in such city, without her knowledge, resulting in injury to her, whether defendant had knowledge of the operation of the mob which attacked the car, or other mobs in the city at the time in question, in time to have warned plaintiff of her danger, and to have taken reasonable precaution for her safety and protection, *held* for the jury.—**Williams v. East St. Louis & S. Ry. Co.**, 232 S.W. 759, 207 Mo. App. 233.

—320 (7). Condition and use of carrier's premises.

**Sup. 1898.** In an action for death by wrongful act, it appeared that (1) defendant suddenly started its car, which deceased was about to enter, at an elevated station, causing deceased to fall off, or requiring him to step off on the station platform; (2) that the railing at the end of the platform did not reach the edge, and that there was left a space of 26 inches, through which deceased was carried by the momentum, and that he fell to the street below. No passengers were allowed to ride on the car steps, and no necessity was shown for leaving so wide a space. The petition declared on the two acts of alleged negligence. *Held*, that the question of defendant's negligence, in not extending the railing nearer to the edge of the platform, was for the jury.—**Barth v. Kansas City El. Ry. Co.**, 44 S.W. 778, 142 Mo. 535.

**Sup. 1899.** Where negligence charged is that a railroad company allowed a hole in its depot platform at the time and near the place where plaintiff got upon defendant's train, and that plaintiff's foot was caught therein, causing injury, a demurrer to the evidence will not be sustained on conflicting evidence as to the existence of the hole and its exact location, as the question is one for the jury.—**Robertson v. Wabash R. Co.**, 53 S.W. 1082, 152 Mo. 382.

**Sup. 1902.** Where a passenger jumps from a moving train in a station and slips on the platform, and there is a conflict of evidence as to whether the platform was greasy, he is entitled to go to the jury.—**Newcomb v. New York Cent. & H. R. R. Co.**, 103 S.W. 348, 169 Mo. 409.

**Sup. 1904.** In an action against a street railway company for injuries to a passenger caused by the falling of a station platform, owing to alleged negligence in permitting the timbers to become rotten, evidence considered, and *held* to justify submission to the jury of the issue of defendant's negligence.—**Wood v. Metropolitan St. Ry. Co.**, 81 S.W. 152, 181 Mo. 433; *Id.*, 81 S.W. 1273, 107 Mo. App. 372.

**Sup. 1904.** In an action against a railroad company for injuries to a passenger, alleged to have been caused by slipping on a greasy platform as he was alighting from a slowly moving train, evidence *held* to justify submission to the jury of the issue of defendant's negligence.—**Newcomb v. New York Cent. & H. R. R. Co.**, 81 S.W. 1069, 182 Mo. 687.

**Sup. 1912.** Evidence *held* insufficient to require submission to jury of railroad company's negligence, in failing to have a guard railing on a platform used by passengers in boarding and alighting from cars.—**Moeller v. United Rys. Co.**, 147 S.W. 1009, 242 Mo. 721.

**App. 1886.** In an action against a carrier for injuries sustained by a passenger by falling off the station platform in the nighttime, it was a question for the jury whether a platform for the use of passengers at such a place, built three feet above the ground, was properly or negligently constructed.—**Stafford v. Hannibal & St. J. R. Co.**, 22 Mo. App. 333.

**App. 1904.** Whether it was negligence for defendant carrier to have the space of 10 to 12 inches between the car and the sta-

tion platform, into which plaintiff stepped in alighting from the car, when only 4 inches were necessary, and there was no uniform custom as to the width of the space, is a question for the jury.—*Randolph v. Chicago, M. & St. P. Ry. Co.*, 79 S.W. 1170, 106 Mo. App. 646.

**App. 1907.** In an action by a passenger for personal injuries sustained in striking his foot against certain pieces of iron on the platform, on account of a jerk of the train while he was getting on the car, where there was no evidence that the pieces of iron were deposited, or permitted to be deposited, on the platform by defendant's employes, it was error to submit that question to the jury in an instruction.—*Price v. St. Louis Transit Co.*, 102 S.W. 626, 125 Mo. App. 67.

**App. 1908.** Whether a carrier failing to maintain a guard rail at the end of a platform used to receive and discharge passengers was negligent, authorizing a recovery for injuries to a passenger falling from the platform while alighting from a car, *held*, under the facts, for the jury.—*Moeller v. United Rys. Co. of St. Louis*, 112 S.W. 714, 133 Mo. App. 68.

**App. 1909.** Whether a carrier impliedly invited a pedestrian approaching the station to become a passenger to deviate from the roadways and cross a graveled area *held* for the jury.—*Chase v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 1141, 134 Mo. App. 655.

Whether a carrier was negligent in maintaining semaphore wires near the ground across a graveled area between two roadways leading to its station *held* for the jury.—*Id.*

**App. 1911.** Evidence, in a railroad passenger's action for personal injuries by stumbling because of the decayed condition of the platform and falling under the train, *held* to make it a jury question whether defendant was negligent as to the condition of the platform.—*Munro v. St. Louis & S. F. R. Co.*, 135 S.W. 1016, 155 Mo. App. 710.

**App. 1917.** Whether defendant railroad was negligent in maintaining a ledge between the tops of the backs of seats in its station for storage of luggage with only a one-inch molding to prevent baggage falling on passengers *held* a jury question.—*Wright v. Kansas City Terminal Ry. Co.*, 193 S.W. 963, 195 Mo. App. 480.

**App. 1922.** In an action for injuries to a passenger slipping on a banana peeling, ev-

idence of negligence *held* insufficient to go to the jury.—*Taylor v. Kansas City Terminal Ry. Co.*, 240 S.W. 512.

**App. 1923.** In passenger's action against railroad for injuries sustained, when struck by door of depot in passing through door on way to train, evidence *held* sufficient for submission to jury of whether the railroad was negligent in maintaining defective automatic door stop.—*Martin v. Missouri Pac. R. Co.*, 253 S.W. 1083.

**App. 1924.** Where passenger on leaving a train stumbled over an obstruction on the depot platform, and was injured thereby, notwithstanding that plaintiff's evidence that it was dark at the time of the fall was contradicted by the record of the movement of trains, as well as by eyewitnesses to the fall, it was for the jury to weigh.—*Roussell v. St. Louis-San Francisco Ry. Co.*, 257 S.W. 516.

In action for personal injury from stumbling over an obstruction on the depot platform after plaintiff alighted from a train, whether defendant was negligent in permitting a gang-plank to lie on a step at a door to the depot was for the jury.—*Id.*

**App. 1924.** In an action for injuries by an intending passenger who stepped on a nail on a station platform, whether carrier exercised degree of care which law requires in maintaining station platform *held* for jury.—*Lowther v. St. Louis-San Francisco Ry. Co.*, 261 S.W. 702, 214 Mo. App. 293.

### 320 (8). Taking up passengers in general.

**Sup. 1892.** Where there is evidence to the effect that the trainmen, instead of warning a passenger not to get on a moving train, directed him to get on, it was for the jury, and not the court, to say what directions he received from the trainmen.—*Fulks v. St. Louis & S. F. Ry. Co.*, 19 S.W. 818, 111 Mo. 335.

**Sup. 1893.** In an action against a carrier for personal injuries to a passenger alleged to be due to negligently failing to stop a train long enough at a station to enable her to go forward to another car in safety, the evidence produced by defendant, standing alone, showed that plaintiff did not leave or attempt to leave the car until the train had started, whereas the evidence of plaintiff and her son was direct and positive that they started out as soon as the train stopped and before it started. *Held*, that there was therefore a direct conflict in the evidence on this

point, and it was for the jury to settle it.—*Smith v. Chicago & A. R. Co.*, 23 S.W. 784, 119 Mo. 246.

**Sup. 1895.** Defendant's passenger depot at a regular station having been burned, its trains were thereafter stopped at a public crossing, where there was no platform, and where the distance from the ground to the lowest step of the coaches was nearly three feet. Plaintiff, while attempting to board a coach to take passage, none of defendant's servants being present to assist her, fell and was injured. *Held*, that the question of negligence was for the jury.—*Eichorn v. Missouri, K. & T. Ry. Co.*, 32 S.W. 993, 130 Mo. 575.

**Sup. 1909.** Evidence, in an action for injuries received while attempting to board, *held* sufficient to carry the case to the jury.—*Joyce v. Metropolitan St. Ry. Co.*, 118 S.W. 21, 219 Mo. 344; *Wellman v. Same*, 118 S.W. 31, 219 Mo. 126.

**Sup. 1927.** Street railway's negligence in striking intending passenger *held* for jury, under conflicting evidence as to cars' speed and time of signal to stop.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

**App. 1916.** Evidence *held* to justify submission of question whether motorman, in exercise of ordinary care, should have known that plaintiff was attempting to board street car before it had reached stopping place.—*Goebel v. United Rys. Co. of St. Louis*, 181 S.W. 1051.

**App. 1920.** In action against suburban railroad for injuries to prospective passenger, struck by car on station platform, question of whether the failure to sound gong or blow whistle in approaching platform constituted negligence *held* for jury.—*Willi v. United Rys. Co. of St. Louis*, 224 S.W. 86, 205 Mo. App. 272.

**App. 1921.** Where there were facts and circumstances on which reasonable men might differ as to whether defendant was guilty of negligence proximately causing the injuries complained of, by failing to exercise a proper degree of care in furnishing plaintiff a reasonably safe means for boarding its train, the court properly submitted the case to the jury.—*Link v. Atlantic Coast Line R. Co.*, 233 S.W. 834.

←320 (9). Starting or moving car while passenger is boarding same.

**Sup. 1882.** In an action against a carrier for injuries sustained by a passenger

while attempting to board a train, *held*, that the question whether plaintiff was guilty of negligence was a question of fact for the jury.—*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475.

**Sup. 1898.** There was evidence that, at the station of defendant's elevated railroad, deceased stepped on the lower step of a car to take passage; that while so doing the car was suddenly started, and deceased either fell off, or, to avoid falling, stepped off on the station platform; that the acquired momentum carried him over the edge of the platform, through an open space between the railing and the side of the car, and that he fell on the street below. *Held*, that a demurrer to the evidence was properly overruled.—*Barth v. Kansas City El. Ry. Co.*, 44 S.W. 778, 142 Mo. 535.

**Sup. 1908.** In an action against street car companies for injuries sustained by the starting of the car while plaintiff was in the act of boarding it, evidence examined, and *held* sufficient to go to the jury as to the negligence of one of the defendants.—*Berry v. St. Louis Transit Co.*, 109 S.W. 661, 211 Mo. 88.

**Sup. 1912.** Whether a street car was started "suddenly"—that is, without notice or unexpectedly to a boarding passenger—*held*, under the evidence, a question for the jury.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

Whether it is negligent to start a street car before a passenger has taken his seat is a question of fact for the jury.—*Id.*

It is not negligence per se to start a street car while passengers are standing either in the car or on the platform or in the vestibule.—*Id.*

**Sup. 1922.** Evidence of plaintiff and two of his companions that, while he was in the act of boarding a street car, the folding doors were closed and the car started, and that his hand was caught between the doors, and he was dragged 50 feet, clearly tended to make a case for the jury as to the company's negligence, so that a demurrer to plaintiff's evidence was properly overruled.—*Hudson v. Kansas City Rys. Co.*, 246 S.W. 576.

**App. 1904.** In an action against a street railroad company for injuries caused by the sudden starting of a car as plaintiff was about to board it, evidence *held* to justify submission of the issue of defendant's neg-

ligence to the jury.—*McKee v. St. Louis Transit Co.*, 83 S.W. 1013, 108 Mo. App. 470.

**App. 1914.** In an action by one who was thrown from a street car when he attempted to board it, the question of the carrier's negligence *held* for the jury.—*Danielson v. Metropolitan St. Ry. Co.*, 162 S.W. 307, 175 Mo. App. 314.

**App. 1921.** In an action for the death of aged man who it was claimed was thrown by the movement of a street car he was attempting to board, the question of the negligence of the operators of the car *held*, under the evidence, for the jury, despite the contention that it necessitated the building of inference on inference.—*Bogges v. Kansas City Rys. Co.*, 229 S.W. 404, 207 Mo. App. 1.

**App. 1921.** Where the only eyewitness of an accident testified that deceased got on the step of a street car which he had signaled to stop, and while he was on the step the car started with a jerk, and deceased fell with his head in the direction taken by the car, and there was nothing to show whether deceased had hold of the handrail or what he might have done to overcome a sudden jerk, *held*, that the manner of the accident was not so contrary to physical laws that a demurrer to the evidence should have been sustained.—*Beckner v. Kansas City Rys. Co.*, 232 S.W. 745.

**App. 1928.** Premature starting of bus *held* act of negligence, making jury case in action for injuries proximately caused thereby.—*Hayward v. People's Motorbus Co. of St. Louis*, 1 S.W.(2d) 252.

320 (10). Operation of trains at places where passengers are being received or discharged.

**App. 1902.** In an action against a street car company for injuries to a passenger, who, immediately after alighting and starting to cross the street behind the car, was struck by another car going in the opposite direction, evidence *held* to justify submission to the jury of the issue as to whether or not the motorman of the latter car rang the gong when approaching.—*Hornstein v. United Rys. Co. of St. Louis*, 70 S.W. 1105, 97 Mo. App. 271.

**App. 1915.** Whether boy alighting from a north-bound car would have been struck by street car going in the opposite direction if its speed had not exceeded 8 miles an hour, *held* a question for the jury.—*Moore v. Metropolitan St. Ry. Co.*, 180 S.W. 408.

**App. 1920.** In action against suburban railroad for injuries to prospective passenger, struck by car on station platform, where there was evidence that headlight had recently become out of order, and at time of accident car was being moved to a place where headlight could be fixed, question of whether operation of car without lighted headlight was negligence *held* for jury.—*Willi v. United Rys. Co. of St. Louis*, 224 S.W. 86, 205 Mo. App. 272.

320 (11). Railroad locomotives and cars.

**Sup. 1896.** Where the action is for damages, on the theory that plaintiff suffered a severe illness as a result of a cold contracted while a passenger in defendant's car, and it appears that the car was very cold; that plaintiff notified the trainmen of his suffering, and repeatedly requested them to make a fire; that there were stoves in the car, and defendant could easily have supplied the needed heat—the facts are for the jury.—*Taylor v. Wabash R. Co.*, 38 S.W. 304, 42 L. R. A. 110.

**Sup. 1925.** Evidence of negligence in allowing snow to remain on steps sufficient for jury.—*Taylor v. Missouri Pac. R. Co.*, 279 S.W. 115, 311 Mo. 604.

**App. 1904.** Evidence in an action by a passenger on a mixed train, injured by a collision between the cars composing the train after the parting of an automatic coupling, *held* to warrant submitting the question of defendant's negligence to the jury, notwithstanding the absence of evidence of any particular defect, and affirmative evidence that the appliances were in good order.—*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

**App. 1907.** Though, where a passenger is injured by reason of a defect of an appliance, the presumption of negligence of the carrier arises, where the plaintiff's evidence showed, not only that the wheels of a car were broken and defective, but also that the defect was such that it could not have been detected by precaution, the court properly sustained a demurrer to the evidence.—*Ferguson v. St. Louis & S. F. R. Co.*, 100 S.W. 537, 123 Mo. App. 590.

**App. 1928.** Evidence *held* insufficient to take issue of negligence in allowing fruit peelings on floor of car, causing injury to passenger, to jury.—*Jones v. St. Louis-San Francisco Ry. Co.*, 5 S.W.(2d) 101.

—320 (12). Railroad tracks and road-beds.

**Sup. 1882.** In an action against a railroad company for injuries in running its trains over a portion of its road rendered dangerous by reason of its having been undermined by a flood, *held*, that under the evidence defendant's negligence was a question for the jury.—*Ely v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 34, followed in *Ellet v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 518.

**Sup. 1914.** In an action for damages for the wrongful death of a passenger from injuries received in a derailment, the question whether a suspended joint caused the derailment, *held*, under the evidence, for the jury.—*Powell v. Union Pac. R. Co.*, 164 S.W. 628, 255 Mo. 420.

**Sup. 1914.** Where a passenger was injured in a wreck caused by a broken rail, the proof raised a *prima facie* case under the doctrine *res ipsa loquitur* requiring submission to the jury.—*Brown v. Louisiana & M. R. R. Co.*, 165 S.W. 1060, 256 Mo. 522.

**App. 1926.** Evidence of carrier's negligence when train broke through bridge, injuring passenger, *held* to make case for jury, under doctrine of *res ipsa loquitur*.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) *State ex rel. St. Louis & S. F. R. Co. v. Daues*, 290 S.W. 425.

**App. 1927.** Issue of negligence *held* for jury in action by passenger for injuries from being struck by filler block thrown up by train.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

**App. 1927.** Carrier's negligence in constructing bridge which gave way, wrecking train and injuring passenger, *held* for jury.—*Curry v. St. Louis-San Francisco Ry. Co.*, 296 S.W. 473, 221 Mo. App. 1.

—320 (13). Tracks and equipment of street railroads.

**Sup. 1907.** In an action for injuries to a passenger, where, at the close of plaintiff's case, there was evidence before the jury of the insufficiency of the appliances to stop the car on the incline where the accident occurred with the cable out of the grip a nonsuit was properly refused.—*Roscoe v. Metropolitan St. Ry. Co.*, 101 S.W. 32, 202 Mo. 576.

**Sup. 1908.** In an action for the death of a passenger on a street car who was a

stranger in the city in which the cars were operated, and unfamiliar with the cars and their operation, and who was struck while protruding his head out of the car in which he was riding by a car on the other track going in the opposite direction, whether or not defendants were negligent in operating the street cars with a space of only six inches between them in passing each other with unguarded openings was a question for the jury.—*Gage v. St. Louis Transit Co.*, 109 S.W. 13, 211 Mo. 139.

In an action against a street railway company for the death of a passenger caused by his being struck by a car on the adjacent track going in the opposite direction from the one on which he was riding while protruding his head outside of the car, it was error to strike out a part of the petition alleging that defendant was negligent in failing to construct and maintain guard railings on the back platform of the car of sufficient height to protect passengers from passing cars, since such question was a question of fact for the jury to determine.—*Id.*

**Sup. 1908.** In an action against a carrier for injuries to a passenger, whether a defendant was negligent in the management and maintenance of a certain car and the machinery appliances, brakes, and running gear thereof *held*, under the evidence, for the jury.—*Beave v. St. Louis Transit Co.*, 111 S.W. 52, 212 Mo. 331.

**App. 1903.** In an action by a street car passenger for injuries sustained by the derailment of the car at a switch, a witness testified that cars frequently jumped the track at that point. The motorman testified that a car was not apt to leave the track if everything was in good condition, and the master mechanic of the defendant stated that such accidents might be prevented by locking the switch, and that it would take about a minute to lock it. *Held*, that evidence of defendant's negligence was sufficient to prevent a nonsuit.—*Heyde v. St. Louis Transit Co.*, 77 S.W. 127, 102 Mo. App. 537.

**App. 1904.** Where a street railway company ran open summer cars, with a continuous footboard on either side, on double tracks, so close together that passengers using the inside footboard would be struck by cars going in the opposite direction, and the plaintiff was struck while he was passing from the rear of the car, along such footboard, to a seat, without knowledge that the tracks were so close together as to render his posi-

tion dangerous, the negligence of the street railway company in leaving such inside foot-board open to the use of passengers was a question for the jury.—*Kreimelmann v. Jourdan*, 80 S.W. 323, 107 Mo. App. 64.

**App. 1911.** In an action against a carrier for personal injuries, the question whether defendant by the highest degree of care could have discovered the alleged defect held for the jury.—*Donovan v. Kansas City Elevated Ry. Co.*, 138 S.W. 679, 157 Mo. App. 649.

Though witnesses for defendant in an action for personal injuries testified that the alleged defect in the trolley pole of an electric car could not have been discovered by inspection, the question whether it might have been discovered is for the jury.—*Id.*

**App. 1912.** A plaintiff, charging injury from an electrified plate on defendant's street car, held required to prove only the fact of injury, the presumption of negligence arising from the injury being sufficient to take the case to the jury.—*Black v. Metropolitan St. Ry. Co.*, 144 S.W. 131, 162 Mo. App. 90.

**App. 1913.** Whether defendant was negligent in having a car door insecurely fastened held a question for the jury.—*Adams v. Metropolitan St. Ry. Co.*, 160 S.W. 38, 174 Mo. App. 5.

#### 320 (14). Condition of elevators.

**Sup. 1897.** It is a question for the jury whether there is negligence in running an elevator operated by a boy, and having an excessive lateral vibration, with the exit unguarded, and a space opposite it at each floor, cut into the wall of the shaft, 16 inches deep, with a door at the rear leading to the hallway, so that a passenger losing his balance might fall onto such landing, and thence under the elevator in the shaft.—*Lee v. Publishers, George Knapp & Co.*, 38 S.W. 1107, 137 Mo. 385.

**Sup. 1900.** Defendant maintained in its building an elevator, which, when in operation, had an excessive lateral vibration. It had no door on the cage, but the exists from the car were through vestibules cut through the wall of the elevator shaft, which was about 16 inches deep, with a door on the outside, so that a passenger losing his balance might fall from the car into the vestibule, and roll from there into the elevator shaft. The elevator, on the night plaintiff's son was killed, was operated by a boy about 15 years old. He told decedent, when the

car was at the third floor, that it was at the fourth floor, and the decedent knowing that the car stopped automatically at the fifth floor, and thinking that the car, when actually at the fourth floor, was at the fifth floor, may have stepped into the vestibule while the car was in motion, from whence he fell into the elevator shaft, and was killed. The evidence was indefinite as to how the accident occurred. Held to require submission to the jury of the questions whether the defendant was negligent in maintaining the elevator in the condition in which it was in, and in employing an incompetent operator.—*Lee v. Publishers, George Knapp & Co.*, 56 S.W. 458, 155 Mo. 610.

#### 320 (15). Management of conveyances in general.

**Sup. 1889.** Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box and several flat cars. Deceased and others were riding on a flat car next the engine, to the knowledge of the conductor and brakemen, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car, but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured except those on the flat car. Held, that the question of negligence was for the jury.—*Wagner v. Missouri Pac. Ry. Co.*, 10 S.W. 486, 97 Mo. 512, 3 L. R. A. 156.

**Sup. 1903.** Though the act of the passenger in taking the position on the step was an act of negligence, which contributed to his injury, the question of the negligence of the motorman, knowing the position of the passenger, running his car into the curve in plain view of the car on the other track, was for the jury.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

A street car passenger, because of the crowded condition of the car, stood on the step of the front platform of the car, outside of the gate inclosing the platform, and on the side next to the track on which cars were operated in the opposite direction. The motorman saw him, and warned him that it was a position of danger. The conductor saw him, and, without warning, collected his fare. It was feasible to carry a passenger

safely in that position. The company carried men safely in that position, and carried this passenger for about two miles, when he was injured by the car and a car traveling on the other track coming nearly in contact with each other at a curve in the road, because of a violation of the rules of the companies operating cars on the tracks, governing the passing of cars at curves. There was nothing to show that the passenger was guilty of negligence after taking his position on the step. *Held*, that the question of defendants' negligence was for the jury.—*Id.*

**Sup. 1907.** In an action for injuries to a passenger, where the petition alleged that the employes of defendant, in violation of a rule of the company and of ordinances of the city, failed to stop a cable train before it began the descent of an incline, and the evidence showed oral instructions to the motormen, and that the grip was likely to be loosened from the cable just before reaching that point, the refusal of an instruction withdrawing from the consideration of the jury that allegation of negligence was proper.—*Rosecoe v. Metropolitan St. Ry. Co.*, 101 S. W. 32, 202 Mo. 576.

In an action for injuries to a passenger, evidence *held* to present a question for the jury whether the servants of the defendant were negligent in not properly using the appliances for controlling the movement of the cable train.—*Id.*

**Sup. 1918.** Whether conductor and motorman of street railway car negligently failed properly to secure their car on slightly inclined track before leaving it, after colliding with brewery wagon, *held* for jury.—*Delfosse v. United Rys. Co. of St. Louis*, 201 S.W. 860.

Whether brakes of street car standing on incline, secured properly by motorman before he left car, were released by boys on front platform, *held* for jury.—*Id.*

**App. 1894.** In an action for injuries sustained in jumping from a freight train under the belief of imminent danger, where it appeared that the brakeman, on hearing a signal from the engine, quickly left his seat and went rapidly to a brake, and set it hurriedly, calling out, "For God's sake, jump!" or "Jump for your lives!" and as a result plaintiff jumped and was injured, a demurrer to the evidence was properly overruled.—*Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

**App. 1933.** In an action against a street railroad company for injuries to a passenger who jumped from a moving car because of fear that the motorman would not stop before reaching an obstruction on the track, evidence *held* to require submission to the jury of the issue of defendant's negligence, even though it should be conceded that the apparent obstruction was so located that it would not, in fact, have injured the car.—*McManus v. Metropolitan St. Ry. Co.*, 92 S. W. 176, 116 Mo. App. 110.

**App. 1906.** Evidence, in an action against a carrier for injuries received by a passenger, mistakenly believing the train at a station because of misunderstanding the announcement of a brakeman, examined, and *held* that the question whether the carrier exercised proper care in making the announcement was for the jury.—*Laub v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 550, 118 Mo. App. 488.

**App. 1922.** In action by passenger injured while jumping from street car beyond control while it was going at a great speed down a hill, whether conductor was negligent in advising plaintiff to leave the car *held* for the jury.—*Hellar v. Kansas City Rys. Co.*, 237 S.W. 811.

In an action for injuries to a passenger received while jumping from a street car beyond control, whether defendant was guilty, and plaintiff entitled to recovery, *held* for the jury, even though evidence as to defendant's negligence was uncontradicted.—*Id.*

**App. 1926.** Motorbus passenger suing for injuries by showing specific act causing injury destroyed prima facie case entitling her to invoke rule of *res ipsa loquitur*, and failed to make case for jury where there was no evidence that such specific act was negligent.—*Heidt v. People's Motorbus Co. of St. Louis*, 284 S.W. 840, 219 Mo. App. 683.

#### ← 320 (16). Overloading or crowding cars.

See explanation, page iii.

#### ← 320 (17). Rate of speed.

**Sup. 1896.** Inasmuch as negligence in operating a street car at an excessive rate of speed depends upon the facts connected with the accident which is claimed to have been occasioned thereby, and the place where it occurred, it was not error to submit to the jury the issue as to whether the car that caused the injuries to plaintiff was moving at rapid speed, where the evidence disclosed



that the rate thereof was from 3½ to 5 miles an hour.—*Van Natta v. People's Street Railway, Electric Light & Power Co.*, 34 S.W. 505, 133 Mo. 13.

**Sup. 1927.** Evidence of negligence of street railroad in exceeding speed limit when striking one intending to take car *held* for jury.—*Unterlacher v. Wells*, 296 S.W. 755, 317 Mo. 181.

**App. 1909.** Whether the speed with which a train was run around a curve was dangerous and negligent is a question for the jury.—*Flucks v. St. Louis, I. M. & S. Ry. Co.*, 122 S.W. 348, 143 Mo. App. 17.

**App. 1910.** In an action against a street railway company for death of a passenger who had just alighted from a car, evidence *held* sufficient to go to the jury on the question whether he was struck and injured by a car running at an excessive speed and whether a gong was sounded.—*Ritcher v. United Rys. Co. of St. Louis*, 129 S.W. 1055, 145 Mo. App. 1.

320 (18). Causing passenger to fall from car.

**Sup. 1886.** Evidence considered, and *held* to present a question for the jury as to a carrier's negligence in failing to provide a gate and in rounding a curve at an excessive rate of speed.—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. App. 332.

**Sup. 1915.** In a suit for death of a passenger thrown from a street car, evidence *held* sufficient to go to the jury.—*Hatchett v. United Rys. Co. of St. Louis*, 175 S.W. 878.

**Sup. 1921.** In an action against a street railway company for personal injuries by being thrown from the steps of a moving car by the closing of the vestibule door as the car passed beyond the edge of an elevated platform, where the evidence was conflicting as to the point on the platform where plaintiff boarded the car and the distance he rode before the accident, it was for the jury to determine whether it was a physical possibility for him to have fallen beyond the edge of the platform.—*Pietzok v. Kansas City Rys. Co.*, 232 S.W. 987, 289 Mo. 135.

**Sup. 1925.** Whether there were persons on car steps preventing closing of door *held* for jury.—*Meyers v. Wells*, 273 S.W. 110.

**Sup. 1925.** Passenger falling off street car steps presented case for jury under rule of *res ipsa loquitur*.—*Brindley v. Wells*, 271 S.W. 48, 308 Mo. 1.

**Sup. 1928.** Whether railroad employé kicked at one riding on pass and who was on step of train coach, causing him to be struck by post and knocked under wheels, *held* for jury.—*Winkler v. Pittsburgh, C., C. & St. L. R. Co.*, 10 S.W.(2d) 649.

**App. 1913.** Whether plaintiff was thrown off while standing on the platform, or was attempting to jump from the car while it was in motion, and fell because of the unusual weight placed on the door, *held* a jury question.—*Adams v. Metropolitan St. Ry. Co.*, 160 S.W. 38, 174 Mo. App. 5.

**App. 1917.** In action for death of passenger who it was claimed fell from rear platform of train, question whether carrier was negligent in leaving gate at rear car door open, and whether passenger fell through open gate, *held* for the jury.—*Daly v. Pryor*, 198 S.W. 91, 197 Mo. App. 583.

320 (19). Sudden lurches, jerks, or jolts.

**Sup. 1884.** Evidence in an action to recover damages for injuries received while a passenger on defendant's train considered, and *held* sufficient to warrant the submission of the case to the jury.—*Coudy v. St. Louis, I. M. & S. Ry. Co.*, 85 Mo. 79.

**Sup. 1884.** While plaintiff, who had boarded defendant's street car, was moving toward the end of the car to take his seat, the car started with a jerk, throwing him off his feet. He endeavored to catch a strap, but missed it, and his hand went through the window, being badly lacerated. There was testimony that the jerk with which the car started was unusual on that line, and that the sensation was as if the horses started off suddenly and rapidly. A car driver testified that by holding the lines tight in one hand and controlling the brake with the other a car could be made to start without a jerk. *Held* to make out a *prima facie* case of negligence against defendant, rendering the granting of a nonsuit erroneous.—(1881) *Dougherty v. Missouri Pac. R. Co.*, 9 Mo. App. 478, affirmed 81 Mo. 325, 51 Am. Rep. 239.

**Sup. 1899.** Evidence that plaintiff was thrown from a cable car by a jerk of the car caused by some action of the gripman, without showing what the gripman did, or how he caused the jerk, or that he caused it at all, is not *prima facie* sufficient to submit to the jury the question of the gripman's negligence.—*Bartley v. Metropolitan St. Ry. Co.*, 49 S.W. 840, 148 Mo. 124.

**Sup. 1921.** In an action for injuries to a passenger alleged to have been thrown against a seat by sudden jolt or jar, evidence *held* sufficient to take the case to the jury.—*Elliott v. Chicago, M. & St. P. Ry. Co.*, 236 S.W. 17.

**Sup. 1925.** Whether motorman exercised due regard for safety of passenger in suddenly or unexpectedly stopping car *held*, under facts, for jury.—*Toomey v. Wells*, 276 S.W. 64, 310 Mo. 696.

**Sup. 1925.** Whether passenger was thrown through open door of car by unusual, sudden, or violent jerk *held* for jury.—*Meyers v. Wells*, 273 S.W. 110.

**App. 1886.** In an action against a street railway company for personal injuries to a boy alleged to have been thrown from the car by a sudden jerk, caused by the horses starting as the driver was at the rear of the car collecting fares, evidence *held* to justify submission of the issue of plaintiff's contributory negligence to the jury.—*Saare v. Union Ry. Co.*, 20 Mo. App. 211.

**App. 1900.** In an action by a passenger on defendant's local freight train, which was supplied with an ordinary caboose, one-half of which was fitted for the carriage of passengers, evidence that the engineer carelessly and negligently stopped the train, by which plaintiff was thrown forward against a stove or woodbox, *held* sufficient to take the case to the jury.—*Dorsey v. Atchison, T. & S. F. Ry. Co.*, 83 Mo. App. 528.

**App. 1902.** A passenger on a freight train was lying in the caboose on a seat running lengthwise of the car with his head towards the engine, and near the iron framework of the seat, and was hurt by the sudden stopping of the train. He testified that he did not know whether he was asleep or not; that when the stop was made his head struck the end of the iron frame of the seat, and he was thrown to the floor, and his head turned in the direction that his feet were when he laid down; that the conductor rushed out of the caboose, swearing at the engineer for making so sudden a stop, etc. In an affidavit made by him at the time of a medical examination the passenger testified that he was asleep at the time. The trainmen testified that the stop was not an unusual one, or made with unusual violence, etc. *Held* error not to sustain a demurrer to the evidence.—*Erwin v. Kansas, Ft. S. & M. Ry. Co.*, 68 S.W. 88, 94 Mo. App. 289.

**App. 1903.** Where evidence conflicted as to whether a passenger left a street car voluntarily while it was in motion, or was thrown from it by the car's sudden starting, the question of the company's negligence was for the jury.—*Scamell v. St. Louis Transit Co.*, 77 S.W. 1021, 103 Mo. App. 504.

**App. 1907.** In an action for injuries alleged to be due to plaintiff being thrown from her seat in defendant's car by the jerking and sudden stopping of the car, *held*, that under the evidence the question whether plaintiff was injured as alleged was for the jury.—*Bowlin v. Union Pac. R. Co.*, 102 S.W. 631, 125 Mo. App. 419.

**App. 1907.** In an action for injuries to a passenger by the sudden stopping of the train by the conductor in order to obviate the effect of the engineer's failure to obey an order to stop, evidence *held* to require submission of question of defendant's negligence to the jury.—*Todd v. Missouri Pac. Ry. Co.*, 105 S.W. 671, 126 Mo. App. 684.

**App. 1911.** Where a passenger on a street car gave the signal to stop by pushing the electric button just after the car left the street before his destination, and the car failed to stop at the street where he wished to alight, but slowed down and stopped, or nearly stopped at a point beyond the street, and he was thrown to the ground, while attempting to alight, by the sudden and violent starting of the car, a demurrer to the evidence in an action for causing his death was properly overruled.—*Norris v. Metropolitan St. Ry. Co.*, 137 S.W. 77, 156 Mo. App. 201.

**App. 1913.** In an action by a railroad mail clerk injured by a jar when the engine was coupled, *held*, that the presumption of negligence arising under the doctrine of *res ipsa loquitur* was sufficient to carry the case to the jury.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S.W. 327, 178 Mo. App. 579.

**App. 1916.** In an action by a passenger injured through having her fingers crushed in the door by a sudden stop of the train, whether defendant managed its train negligently and unskillfully, so as to cause it to check its speed very suddenly, *held* for the jury.—*Daniels v. St. Louis, I. M. & S. Ry. Co.*, 181 S.W. 599.

**App. 1916.** In an action against a street railroad for personal injuries, caused by a fall, the question whether the car jerked *held* for the jury.—*Modrell v. Dunham*, 187 S.W. 561, 564.

**App. 1917.** Whether street railway was negligent in starting car with sudden jerk while deceased and others were riding on step *held* question for jury.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

**App. 1917.** In action for injuries to one attempting to board a car from sudden starting, plaintiff's evidence *held* sufficient to go to the jury.—*Husbands v. St. Louis Electric Terminal Ry. Co.*, 196 S.W. 78.

**App. 1918.** Evidence *held* to present jury question whether a street car started with undue violence and an excessive jerk, so as to throw passenger to the floor.—*Shafer v. Kansas City Rys. Co.*, 201 S.W. 611.

**App. 1920.** Where the evidence showed that plaintiff boarded defendant's street car and was in the act of sitting down when, before she had a reasonable time to do so, the car was started suddenly and violently with a jerk throwing her into the vestibule on the floor and injuring her, a demurrer to the evidence was properly overruled.—*Fletcher v. Kansas City Rys. Co.*, 221 S.W. 1070.

**App. 1920.** Testimony by a passenger that, while she was standing on the car platform waiting for the train to stop, it suddenly lunged forward with an extraordinary jerk and threw her off, is sufficient to take the case to the jury over defendant's demurrer to the evidence.—*Rooker v. Deering Southwestern Ry. Co.*, 226 S.W. 69, 206 Mo. App. 79.

**App. 1923.** In an action for injuries to a passenger alleged to have been thrown against a seat by a sudden jolt or jar of the train, evidence *held* sufficient to take the case to the jury.—*Rhodes v. Missouri Pac. R. Co.*, 255 S.W. 1084, 213 Mo. App. 515.

**App. 1925.** Plaintiff's testimony, corroborated by other facts and circumstances, *held* to take case to jury.—*Traynor v. Wells*, 273 S.W. 1100.

Evidence as to plaintiff's being thrown forward *held* not contrary to physical laws.—*Id.*

**App. 1928.** Question of when and how passenger was thrown while attempting to board motorbus *held* for jury.—*Altzheimer v. People's Motorbus Co. of St. Louis*, 6 S.W. (2d) 976.

**App. 1928.** Whether railroad should have anticipated injury to shipper of stock from bumping car after alleged statement of

brakeman that train would not move *held* for jury.—*Lincoln v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 460.

Negligence *held* for jury, in shipper's action against railroad for injuries sustained on sudden bumping of car, after alleged statement of brakeman relative to watering of stock that train would not move.—*Id.*

### 320 (20). Passing other vehicles or objects.

**Sup. 1893.** Where plaintiff, while riding on the step of defendant's street car, was knocked off by a derrick standing near the track, the fact that the track had been moved nearer the derrick on the day of the accident tends to show negligence on the part of defendant's driver as he must have known of its proximity to the cars, and for that reason should have used care to avoid exposing passengers to danger, and the question as to his negligence is for the jury.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1904.** In an action against a street railroad for injuries to a passenger while attempting to take a seat in a car by way of the inner footboard, next to a car line on which cars ran in the opposite direction, one of which struck plaintiff, causing his injuries, evidence examined, and *held* to present a question for the jury as to whether defendant was negligent.—*Allen v. St. Louis Transit Co.*, 81 S.W. 1142, 183 Mo. 411.

**App. 1908.** In an action by a passenger on a street car to recover for injuries received by striking a wagon which the car was passing, evidence that the car was running at its usual speed when the danger was discovered, and that no effort was made to reduce the speed until plaintiff was injured, is sufficient to justify submitting to the jury the question whether the gripman ran the car rapidly past the wagon.—*Vessels v. Metropolitan St. Ry. Co.*, 108 S.W. 578, 129 Mo. App. 708.

**App. 1909.** Where the evidence shows that plaintiff was a passenger on an open street car, and that the conductor while on the running board on the side of the car, in attempting to swing around a passenger in collecting fares, struck a wagon near the track causing it to swerve so as to throw the pole of the wagon into the car and against plaintiff, and that the car was running at the rate of 14 or 15 miles an hour, the question of defendant's negligence was for the jury.—*Monday v. St. Joseph Ry., Light, Heat & Power Co.*, 119 S.W. 24, 136 Mo. App. 692.

**App. 1918.** In action by a passenger on crowded car, brushed off step by a wagon near the track, evidence *held* to present question as to the right to recover.—*Smith v. Kansas City Rys. Co.*, 204 S.W. 575.

⇐ 320 (21). **Collision.**

See Automobiles, ⇐ 245.

**Sup. 1899.** In an action against a street railway company for the death of a passenger, caused by a collision between the car on which he was riding and a broken-down wagon on the track, there was evidence that the gripman was engaged in conversation with a passenger, and was not looking at the track ahead of him. Passengers on the train testified that they saw the wagon on the track when within 50 to 125 feet from it, and the driver of the wagon and another testified that the driver had gone up the track about 60 feet to warn the approaching car, but that the gripman paid no attention to him; the evidence being conflicting whether the car could have been stopped within 40 feet or in not less than 75 feet. *Held*, that the question of the gripman's negligence was for the jury.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

**Sup. 1912.** Evidence in passenger's action for injuries sustained in a collision with a steam roller *held* to sufficiently show defendant's negligence as against demurrers thereto.—*Stauffer v. Metropolitan St. Ry. Co.*, 147 S.W. 1032, 243 Mo. 305.

**Sup. 1920.** In action for injuries to passenger in collision of street cars, motorman's testimony as to how far he was from other car when he concluded that there was danger of a collision *held* inadmissible; the question being when he should have reached such conclusion, and such question being for the jury.—*Ganz v. Metropolitan St. R. Co.*, 220 S.W. 490.

**Sup. 1922.** In an action by a passenger injured in a collision while attempting to alight from a street car by reason of imminence of such collision with a defective car running backward down a hill, negligence of defendant in running the defective car *held* for the jury.—*Walquist v. Kansas City Rys. Co.*, 237 S.W. 493.

**Sup. 1927.** In passenger's action for injuries, whether engineer was negligent in not seeing open switch and stopping train before collision *held* for jury.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**Sup. 1928.** Evidence *held* to require submission to jury of negligent operation of

street car and opening of door in collision, causing passenger to be thrown out.—*Morris v. Union Depot Bridge & Terminal R. Co.*, 8 S.W.(2d) 11.

**App. 1900.** In an action to recover for injuries received while a passenger on defendant's freight train, it was proper to overrule a demurrer to the evidence of plaintiff, where his evidence tended to show that while walking to the door of the caboose, he was thrown violently forward by a collision between the caboose and a car on a side track, which had been left too near the switch leading from the track on which the train carrying plaintiff was running.—*Fullerton v. St. Louis, I. M. & S. Ry. Co.*, 84 Mo. App. 498.

**App. 1904.** Evidence in an action for injury to a passenger in a street car by the breaking of a window therein, *held* sufficient to go to the jury on the claim of plaintiff that it was caused by the collision of that and another car while passing at a high speed, with a swaying motion, on a curve.—*Binsbacher v. St. Louis Transit Co.*, 82 S.W. 546, 108 Mo. App. 1.

**App. 1905.** In an action against a street railway and railroad for injuries sustained by a passenger on a street car, as the result of a collision between the street car and a railroad car, there was evidence that the watchman employed by both the street railway and railroad had had an altercation with a switchman employed by the railroad as to their respective duties in the manner of giving crossing signals, and that on the occasion of the accident the watchman refused to heed signals of the switchman and the switchman refused to notify the watchman of the approach of the railroad car and gave signals direct to the motorman. *Held*, that there was sufficient evidence of negligence to take the case to the jury as against the street railway company.—*Hamilton v. Metropolitan St. Ry. Co.*, 89 S.W. 893, 114 Mo. App. 504.

**App. 1908.** In an action for injuries to a street car passenger in a collision between the car and a city hose cart, evidence *held* to require submission of the railway company's negligence to the jury.—*Williamson v. St. Louis & M. R. R. Co.*, 113 S.W. 239, 133 Mo. App. 375.

**App. 1908.** In an action by a street car passenger against the street railway company and a railroad company for injuries in a collision at a crossing, the questions whether the railroad company exceeded the speed prescribed by ordinance, or failed to give the

necessary warning of its approach, were for the jury under the evidence.—*Wills v. Atchison, T. & S. F. Ry. Co.*, 113 S.W. 713, 133 Mo. App. 625.

**App. 1910.** In an action for injury to a passenger on defendant's train, the rear car of which was struck at a crossing by the train of another company, defendant's negligence held a jury question.—*Marriott v. Missouri Pac. Ry. Co.*, 126 S.W. 231, 142 Mo. App. 199.

**App. 1910.** In an action against a street car company for personal injuries to a passenger in a collision between a car and a metal tower erected in a public square near the track, whether defendant had rebutted the presumption of negligence held under the evidence for the jury.—*Wolven v. Springfield Traction Co.*, 128 S.W. 512, 143 Mo. App. 643.

**App. 1911.** Whether a motorman was guilty of negligence in so operating his car as to cause a collision between it and a train held, under the evidence, for the jury.—*Augustus v. Chicago, R. I. & P. Ry. Co.*, 134 S.W. 22, 153 Mo. App. 572.

**App. 1920.** In an action by a passenger on a street car for personal injuries suffered in a collision between a street car and a freight train, failure of conductor to perform his duty in going ahead of the street car and flagging it across the railroad track constituted an act of negligence, and one which plaintiff had a right to submit to the jury as a ground for verdict in her favor.—*Bergfeld v. Dunham*, 228 S.W. 891.

**App. 1921.** In action for injury to passenger standing in front vestibule of street car by collision with wagon, physical facts as to point of contact between car and wagon held not to show under the evidence that the motorman could not have been negligent, and demurrer to the evidence was properly denied.—*Moran v. Kansas City Rys. Co.*, 232 S.W. 1111.

**App. 1924.** In an action against a carrier for injuries to passenger in a collision wherein plaintiff made a prima facie case, whether carrier had relieved itself by showing its exercise of highest degree of care or unavoidable accident, or some cause which the highest degree of care could not have avoided, held for the jury.—*Gibson v. Wells*, 258 S.W. 1.

**App. 1924.** Whether plaintiff's testimony and inferences therefrom, in an action

against a street railway company for injuries to a passenger in a collision between a street car and a motor truck, were such as to relieve defendant, which offered no testimony, from liability, held for the jury.—*Cecil v. Wells*, 259 S.W. 844, 214 Mo. App. 193.

**App. 1927.** Negligence of motorbus company held for jury, where street car struck rear of bus as bus stopped.—*Stegman v. People's Motorbus Co. of St. Louis*, 297 S.W. 189, 193.

**App. 1927.** Liability of motorbus company for injury to passenger in street car collision held for jury under doctrine of res ipsa loquitur.—*Myerson v. People's Motorbus Co. of St. Louis*, 297 S.W. 451.

### 320 (22). Derailment of cars.

**Sup. 1888.** Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box car, and several flat cars. Deceased and others were riding on a flat car next to the engine, to the knowledge of the conductor and brakeman, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car, but they preferred to ride on the flat car. The road was rough and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured, except those on the flat car. Held, that the questions of negligence and absence of contributory negligence were for the jury.—*Wagner v. Missouri Pac. Ry. Co.*, 10 S.W. 486, 97 Mo. 512, 3 L. R. A. 156; *Zuendt v. Same*, 10 S.W. 491.

**Sup. 1913.** In an action for injuries to a railroad passenger by derailment, whether the derailment was caused by a snowstorm so as to be unavoidable, and exempt defendant from liability, held a jury question.—*Hurek v. Missouri Pac. Ry. Co.*, 158 S.W. 581, 252 Mo. 39.

**Sup. 1925.** In action by passenger for injury from derailment of street car, evidence of defendant's negligence held sufficient to go to jury.—*Trowbridge v. Fleming*, 269 S.W. 610.

**Sup. 1926.** Evidence showing wreck resulted in injury to railway mail clerk held to make case for jury, though defendant's evidence showed wreck was caused solely by act of God.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

**Sup. 1927.** Evidence showing derailment resulted in injury to railway mail clerk on duty *held* to make case for jury, though defendant's evidence tended to show high degree of care.—*Scheipers v. Missouri Pac. R. Co.*, 298 S.W. 51.

**App. 1928.** Whether street car passenger was injured, and injury was due to defendants' negligence, *held* jury questions.—*Van Tresse v. Kansas City Public Service Co.*, 4 S.W.(2d) 1095.

### —320 (23). Management of elevators.

**Sup. 1903.** An elevator operator testified that after a passenger had been caught in the door and the elevator raised a couple of feet it came to a full stop, and the passenger could have got back into the car; that he left the car down, watching the passenger more than he should have done, and the elevator less, and permitted it to go too low, injuring the passenger. *Held*, that an instruction to find for the defendant was properly refused.—*Luckel v. Century Bldg. Co.*, 76 S.W. 1035, 177 Mo. 608.

**Sup. 1908.** In an action for injuries through the falling of an elevator, evidence tending to prove that defendants were operating the elevator, and were common carriers of passengers; that plaintiff was a passenger on the elevator, together with proof of the accident and attending circumstances and plaintiff's injuries—was sufficient to make out a *prima facie* case, entitling plaintiff to go to the jury.—*Orcutt v. Century Bldg. Co.*, 112 S.W. 532, 214 Mo. 35.

**App. 1893.** In an action for an injury occasioned by the use of an elevator belonging to defendant, *held*, under the testimony, that the trial court did not err in leaving it to the jury to say whether deceased negligently stepped off the elevator or was thrown therefrom by the unsteadiness of the car.—*Lee v. Publishers: George Knapp & Co.*, 55 Mo. App. 300.

**App. 1905.** Defendants' elevator operator shut the elevator door on plaintiff's dress while she was standing in the car, and lowered the elevator at the same instant. The operator, seeing plaintiff's peril, suddenly reversed the lever, which resulted in the car suddenly turning upward, causing plaintiff's injuries; the operator claiming that, unless he acted as he did, the descent of the elevator could not have been stopped quickly enough to save plaintiff from harm. *Held*, that

whether the operator was negligent in handling the elevator after he saw plaintiff's danger was for the jury.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**App. 1906.** Where, in an action for injuries to an elevator passenger, plaintiff testified that the elevator was motionless and even with the floor of the corridor of the building when she attempted to leave it immediately behind her companion, that the doors were then wide open for the exit of passengers, and that just as she stepped out, with her foot raised to step on the floor of the corridor, the elevator started and she felt herself hauled violently backward with the result that her foot and leg were crushed, such proof was sufficient to present the issue of defendant's negligence in prematurely starting the elevator.—*Becker v. Lincoln Real Estate & Building Co.*, 93 S.W. 291, 118 Mo. App. 74.

**App. 1920.** In an action for injuries by falling down an elevator shaft in a store, evidence *held* sufficient to take the case to the jury.—*Grote v. Hussmann*, 223 S.W. 129, 204 Mo. App. 466.

**App. 1925.** In action under Rev. St. 1919, § 4217, for death of elevator passenger, evidence that doors of elevator would not latch, which was known to operator and manager of building, and that operator attempted to run elevator from basement knowing of such condition, *held* to make question whether facts constituted aggravating circumstances one for jury.—*Williams v. Short*, 268 S.W. 706, 219 Mo. App. 99, transferred from Supreme Court (1924) 263 S.W. 200.

### —320 (24). Protection of passengers from incidental dangers.

**Sup. 1906.** In an action against a street railway by a passenger for injuries received by being struck by a missile thrown by a bystander, plaintiff testified that he was seated near the front of the car, and that as the car approached the corner, where by ordinance it was required to stop, he saw a man standing between the tracks, making violent motions with something in his hands. His next recollection was of transactions after the injury. Another witness testified to seeing some one throw a missile through the front vestibule of the car. *Held* insufficient to take to the jury the question of the company's negligence.—*Woas v. St. Louis Transit Co.*, 96 S.W. 1017, 198 Mo. 604, 7 L. R. A. (N. S.) 231, 8 Ann. Cas. 584.

320 (25). **Setting down passengers in general.**

**Sup. 1905.** In an action against a street railway for injuries received by plaintiff, a passenger, while alighting from a car, evidence *held* sufficient to authorize submission of the case to the jury.—*McHugh v. St. Louis Transit Co.*, 88 S.W. 853, 190 Mo. 85.

**Sup. 1919.** In a personal injury action against a street railway company, where it appeared that plaintiff was injured while attempting to alight from defendant's car after having boarded it, due to an acceleration of speed, the conductor having informed plaintiff that the car was going to the barn, and having kicked a bundle belonging to plaintiff from the platform, conflicting evidence *held* to carry all the issues to the jury.—*Chapman v. Kansas City Rys. Co.*, 217 S.W. 290.

**Sup. 1922.** Negligence of a motorman opening the door for a passenger to alight before the car had come to a full stop, but while its motion was claimed to be so smooth as to be imperceptible to a passenger injured in attempting to alight therefrom after dark, *held* for the jury.—*Hibler v. Kansas City Rys. Co.*, 237 S.W. 1014.

**Sup. 1924.** Evidence of conductor's negligence in assisting passenger to alight from interurban car *held* sufficient to go to jury.—*Lackey v. Missouri & K. I. Ry. Co.*, 264 S.W. 807, 305 Mo. 260.

**Sup. 1925.** Whether street car conductor declared that he opened door of car too soon *held* for jury.—*Rosenzweig v. Wells*, 273 S.W. 1071, 308 Mo. 617.

**App. 1904.** In an action against a street railway company for personal injuries received by a passenger in alighting from a car, evidence examined, and *held* to tend to show the negligence alleged, and not to warrant a nonsuit.—*Duffy v. St. Louis Transit Co.*, 78 S.W. 831, 104 Mo. App. 235.

**App. 1904.** Evidence that plaintiff boarded defendants' train at Y., where it was made up, to be carried to C.; that it had rained the day and night previous, and the ground was muddy; that the train en route stopped at several stations, at which passengers got on; and that, while plaintiff was alighting at C., getting off in the ordinary way, she slipped on mud on the car step, of which there was considerable—makes a *prima facie* case for the jury.—*Vancleve v. St. Louis, M. & S. E. R. Co.*, 80 S.W. 706, 107 Mo. App. 96.

**App. 1911.** In an action for injuries to a street car passenger while alighting from a

car, evidence *held* to require submission of the question of negligence to the jury.—*Lucas v. United Rys. Co. of St. Louis*, 133 S.W. 107, 154 Mo. App. 16.

**App. 1911.** In an action against a street railway for personal injuries received by one preparing to alight, evidence *held* to raise a question for the jury, and plaintiff's case not to be disproven by certain physical facts.—*Holland v. Metropolitan St. Ry. Co.*, 137 S.W. 995, 157 Mo. App. 476.

**App. 1913.** In an action against a carrier for injuries to a passenger who slipped upon the step as she alighted, the question of the carrier's negligence *held* for the jury.—*Craig v. United Rys. Co. of St. Louis*, 158 S.W. 390, 175 Mo. App. 616.

**App. 1915.** In an action by a passenger, injured in attempting to alight from a train, evidence *held* sufficient to carry the case to the jury.—*Thomure v. St. Louis & S. F. R. Co.*, 177 S.W. 708, 191 Mo. App. 640.

**App. 1915.** Evidence in an action for personal injury to a passenger while attempting to alight at a station *held* to make the defendant's negligence a question for the jury.—*Johnson v. St. Louis & S. F. R. Co.*, 178 S.W. 239, 192 Mo. App. 1.

**App. 1920.** In an action by a passenger on a street car whose coat caught in the car door as she was alighting, resulting in her being thrown from the step and dragged, a demurrer to the evidence *held* properly overruled.—*Chapman v. Kansas City Rys. Co.*, 217 S.W. 623.

**App. 1922.** In an action for injuries while alighting from a street car, whether the step was raised by the closing of the door by the conductor before plaintiff's foot left the step and while her other foot was on the ground *held* for the jury.—*McCormack v. United Rys. Co. of St. Louis*, 238 S.W. 579.

**Sup. 1900.** Where, in an action for injuries against a street-railway company, caused by the negligent handling of a car on which plaintiff was a passenger, there is some evidence that the accident resulted from the gripman's starting the car suddenly after slowing it down to allow plaintiff to alight, a demurrer to plaintiff's evidence is properly overruled.—*Grace v. St. Louis R. Co.*, 56 S.W. 1121, 156 Mo. 295.

**App. 1904.** In an action against a carrier for injury to a passenger from the negli-

gent starting of the car while the passenger was endeavoring to alight therefrom, evidence examined, and *held* sufficient to establish a prima facie case entitling plaintiffs to go to the jury.—*Abbitt v. St. Louis Translt Co.*, 81 S.W. 484, 103 Mo. App. 640.

**App. 1904.** In an action for injuries sustained by a passenger on alighting from defendant's train, *held*, that it was a question for the jury whether defendant was negligent in failing to allow plaintiff sufficient time to alight before starting the train.—*Gress v. Missouri Pac. Ry. Co.*, 84 S.W. 122, 109 Mo. App. 716.

**App. 1905.** Where a street car was operated by a motorman without a conductor, and, from his station on the front platform, he got the best observation possible to see that no one was getting on or off the car, and then sounded the gong as notice of his intention to start, he was not guilty of negligence, as a matter of law, in failing to ascertain that plaintiff was in the act of alighting when he started the car.—*Cramer v. Springfield Traction Co.*, 87 S.W. 24, 112 Mo. App. 350.

←320 (26). **Starting or moving car while passenger is alighting.**

**Sup. 1879.** In an action for causing the death of a passenger by defendant's failing to stop its train at the station, and by inducing deceased to leave the train while it was in motion, evidence reviewed, and *held*, that the case should be submitted to the jury.—*Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604.

**Sup. 1881.** If an insufficient time is allowed a passenger to alight, but before he attempted to alight the train was started, and he then jumped from the train while its motion was still so slight as to be almost imperceptible, and was injured, it was for the jury to determine, from the age and physical condition of plaintiff, whether such act constituted negligence.—*Straus v. Kansas City St. J. & C. B. R. Co.*, 75 Mo. 185.

**Sup. 1883.** Plaintiff alleged injuries by reason of the negligent starting of defendant's train, on which she was a passenger, before she could get off. The evidence was conflicting as to whether the train stopped at all, but all agreed that the halt, if any, was a very brief and unusual one. *Held* sufficient to take the case to the jury.—*Clotworthy v. Hannibal & St. J. R. Co.*, 80 Mo. 220.

**Sup. 1885.** Whether a conductor, who saw plaintiff coming down the steps of the

car in the act of alighting therefrom, was guilty of negligence in giving a signal to the engineer to start the train a moment or so after, without again looking to see whether plaintiff had safely reached the platform, was a question for the jury.—*Straus v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo. 421.

**App. 1881.** Where a city ordinance makes it the duty of conductors to see that ladies shall not be permitted to leave the car while the same is in motion, it cannot be declared, as a matter of law, that there was no negligence on the part of the company, where the evidence shows that a lady was permitted, without remonstrance from the conductor, to leave a car in motion.—*Fortune v. Missouri R. Co.*, 10 Mo. App. 252.

**App. 1891.** Where a child, six years old, was permitted by the driver of a street car to get off the front end of the car, and the car was suddenly started forward while the child was in the act of alighting, the question of the street railroad's negligence was properly submitted to the jury.—*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1892.** When a railway company fails to bring its train to a full stop at a station, it will be liable in damages for injuries sustained by a passenger in attempting to alight, if, under all the circumstances, it was prudent for him to do so; and the question of negligence must be treated as a mixed question of law and fact, the facts being left to the jury and the legal effect of them declared by the court.—*Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104.

**App. 1892.** Where a passenger is injured while alighting from a train by the sudden starting of the train and the shutting of the car door, in an action for the injury a nonsuit is properly refused, unless a conclusive presumption of contributory negligence arises out of plaintiff's own testimony or that of her witnesses.—*Madden v. Missouri Pac. Ry. Co.*, 50 Mo. App. 666.

**App. 1905.** Where, in an action against a street railway company for injuries to a passenger while alighting from a car, in consequence of its sudden starting, the evidence was conflicting, on the question whether the passenger fell in the same direction the car was headed, the court could not say as a matter of law that the physical facts shown by the testimony that the passenger fell in the same direction the car was headed disproved



plaintiff's case.—*Gharst v. St. Louis Transit Co.*, 91 S.W. 453, 115 Mo. App. 403.

**App. 1008.** Where plaintiff's own testimony that her injury was the result of the premature starting of defendant's street car while she was attempting to alight was corroborated by physical facts, the question whether she was injured in the manner claimed, or in attempting to alight in an improper manner before the car came to a stop, as defendant claimed, and as five disinterested witnesses testified, was for the jury.—*Cartlich v. Metropolitan St. Ry. Co.*, 108 S.W. 584, 129 Mo. App. 721.

**App. 1910.** In an action for death of a passenger while attempting to alight from a street car, evidence *held* to require submission of defendant's alleged negligence, in prematurely starting the car as decedent was in the act of alighting, to the jury.—*Cooke v. Springfield Traction Co.*, 129 S.W. 265, 144 Mo. App. 451.

**App. 1911.** In an action by a passenger against a street car company for negligently starting a street car as she was alighting, evidence *held* sufficient to go to the jury as to defendant's negligence, though the place was not the usual place for letting off passengers, but was only used for a safety stop.—*Kinyoun v. Metropolitan St. Ry. Co.*, 134 S.W. 15, 153 Mo. App. 477.

**App. 1911.** Whether a street car passenger was thrown from the car while alighting caused by the sudden starting of the car or whether she accidentally tripped and fell while the car was standing, *held*, under the evidence, for the jury.—*Zeller v. Metropolitan St. Ry. Co.*, 134 S.W. 1067, 153 Mo. App. 613.

**App. 1912.** In an action for injuries to a street car passenger while alighting caused by the sudden starting of the car, evidence *held* to require submission to the jury of the question of negligence.—*Haskell v. Metropolitan St. Ry. Co.*, 142 S.W. 1091, 161 Mo. App. 64.

**App. 1912.** In an action for injuries to a street car passenger while alighting caused by the sudden starting of the car, evidence *held* to authorize submission of the case to the jury.—*Stone v. Metropolitan St. Ry. Co.*, 142 S.W. 1092, 161 Mo. App. 37.

**App. 1913.** It cannot be said as matter of law that plaintiff's version of her injury that, while standing on the lower step of a

street car ready to alight, a sudden movement of the car threw her off, she yet alighting on her feet, and so jarred her as to cause a prolapsed uterus, is so contrary to physical law and so incredible that it should be accorded no probative value.—*Stokes v. Metropolitan St. Ry. Co.*, 160 S.W. 46, 173 Mo. App. 676.

**App. 1916.** Where a passenger, injured in alighting from car, claimed that her injuries were caused by premature start of car, question whether car was prematurely started was for jury.—*Davis v. Metropolitan St. Ry. Co.*, 185 S.W. 1170.

**App. 1917.** Plaintiff's testimony as to the way he fell when open street car was suddenly started while he was alighting *held* not so contrary to physical or natural laws as to authorize sustaining of demurrer to evidence.—*Middleton v. St. Joseph Ry., Light, Heat & Power Co.*, 195 S.W. 527, 196 Mo. App. 258.

**App. 1918.** Evidence that defendant street railway's car, which had decreased speed or stopped at safety stop opposite post office substation, resumed usual speed while plaintiff passenger was alighting, etc., *held* to make defendant's negligence a jury question.—*Hays v. Metropolitan St. Ry. Co.*, 201 S.W. 566.

**App. 1918.** Testimony of passenger, falling while alighting on sudden starting of car, that she fell with head in direction car was going, *held* not so contrary to physical law as to require sustaining of demurrer to evidence.—*Hoffman v. Dunham*, 202 S.W. 429.

**App. 1919.** In a street car passenger's action for injuries, evidence by plaintiff on direct examination that the car started and threw her when she was stepping off was not inconsistent with her evidence on cross-examination that the car dragged her a short distance.—*Whitaker v. Kansas City Rys. Co.*, 209 S.W. 632.

**App. 1919.** Where a passenger on a street car fell in alighting from the car which was moving very slowly when the motorman opened the door to allow passengers to alight, the question whether the street car company was negligent *held* for the jury.—*Tillery v. Harvey*, 214 S.W. 246.

**App. 1921.** In woman passenger's action against street railway company for injuries from being dragged when seized by her right hand by the conductor as she was thrown by sudden starting of the car, evidence *held* not

such as to justify demurrer to the evidence on the ground that the accident as described was a physical impossibility.—*Keith v. Kansas City Rys. Co.*, 231 S.W. 1046.

**App. 1921.** Evidence *held* to sustain verdict for injuries to alighting passenger from prematurely starting street car.—*Huntington v. Kansas City Rys. Co.*, 233 S.W. 95. See Carriers, ¶318(10) in this Digest.

**App. 1926.** In action for injuries sustained by plaintiff's wife when alighting from street car, evidence *held* to make case for jury under doctrine of *res ipsa loquitur*.—*Lammert v. Wells*, 282 S.W. 487.

¶320 (27). **Setting down passenger at improper time or place.**

**Sup. 1899.** A witness testified that, after plaintiff had fallen, while attempting to alight, the conductor asked witness if he had seen that. *Held*, that the evidence raised the question whether the conductor saw the passenger attempting to alight.—*Cobb v. Lindell Ry. Co.*, 50 S.W. 310, 149 Mo. 135.

The passenger and several witnesses testified that they did not notice whether the conductor rang the bell, but all the witnesses except one, who was on the sidewalk, were on the rear car. One witness testified that the conductor placed his hand on the bell rope. *Held*, that the evidence raised the question whether the car was stopped to let the passenger off.—*Id.*

Several blocks before reaching a crossing a passenger on a street car told the conductor to let her off there, and, seeing that the car was about to pass that point, she again signaled him to let her off, and he nodded to her. Immediately the car slowed down until the motion was scarcely perceptible, when she attempted to alight, taking hold of the railing, and, when one foot was on the ground, the car suddenly started, throwing her. The company claimed that the car slowed up where it did, as was usual, to enable the motorman to see if there were any cars on an intersecting line on the next street, but the testimony did not show that the passenger knew this, or knew that it was unlawful to stop in the middle of a block to discharge passengers. She knew it was customary for the conductor to ring the bell to stop, but testified that she did not know whether he rang it this time or not, and that she did not see him after she signaled. *Held*, that the case was properly left to the jury to determine whether the passenger was justified in alighting.—*Id.*

**Sup. 1920.** In action for injuries to passenger carried past her station, resulting from being struck by another car on a trestle on going back to her destination by way of the track, evidence *held* sufficient to take case to jury.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**App. 1892.** In an action against a railroad for injuries sustained by plaintiff, owing to his having attempted to alight from a train while in motion, the trainman having told him there was no danger in getting off, *held*, that the question whether plaintiff was a passenger, or a mere trespasser, was one for the jury.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 48 Mo. App. 224.

**App. 1897.** Evidence, in an action to recover for personal injuries sustained by a passenger when alighting from a train, examined, and *held* to require the submission to the jury of the question whether the place at which the passenger was invited to alight was a reasonably safe place.—*Talbot v. Chicago & A. Ry. Co.*, 72 Mo. App. 291.

It is the duty of a railroad company, not only to carry a passenger safely, but to furnish him a reasonably safe place to alight from the train; and whether or not the place furnished a passenger to alight from a train is a reasonably safe place for passengers to get off the train is a question for the jury.—*Id.*

**App. 1909.** In an action for injuries by being misled to alight at an improper place, evidence *held* to warrant a submission of the case to the jury.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497, 135 Mo. App. 254.

**App. 1927.** Whether street car from which transferring passenger struck by automobile had alighted stopped at regular stopping place *held* for jury.—*Watts v. Fleming*, 298 S.W. 107, 221 Mo. App. 1123.

¶320 (28). **Providing safe place or means for alighting from cars.**

**App. 1904.** Though a street railway company was under no obligation to fence a ditch which had been excavated beside its tracks, it was its duty to use high care to protect a passenger in setting her down beside it when it was so overflowed with water as to be invisible, and it was for the jury to say whether care was observed in permitting her to alight without notifying her of the danger or taking precautions to prevent a mishap.—*MacDonald v. St. Louis Transit Co.*, 83 S.W. 1001, 108 Mo. App. 374.

**App. 1917.** In an action against a carrier for injury to a passenger, who slipped on an icy step, *held*, that the carrier's negligence was for the jury.—*Bate v. Harvey*, 195 S.W. 571.

**App. 1923.** In an action against a street railroad for injuries to an alighting passenger who caught his foot in a switch, evidence of company's negligence *held* sufficient to go to jury.—*Brooks v. Union Depot Bridge & Terminal R. Co.*, 258 S.W. 724, 215 Mo. App. 643.

**App. 1923.** In an action for injuries sustained by plaintiff while alighting from defendant's passenger train when the step box on which she stepped turned over, in which there was evidence that it was the uneven platform under the box that caused it to turn over, and that defendant by the exercise of the highest degree of care could have known that the uneven platform would have rendered the step box insecure, the question of the negligence of defendant was for the jury.—*Tanner v. Chicago, R. I. & P. Ry. Co.*, 258 S.W. 730.

320 (29). Care as to persons accompanying passengers.

**Sup. 1928.** Whether railroad was negligent in not affording husband, injured when alighting from train after aiding wife in finding seat, an opportunity to get off train safely, *held* for jury.—*Lewis v. Illinois Cent. R. Co.*, 3 S.W.(2d) 371, 319 Mo. 233.

**App. 1903.** Plaintiff alleged that, while he was assisting his daughter on the train, defendant negligently started the train, and when plaintiff reached the platform it was moving so slowly that he could without negligence leave it safely, and when he was on the lower step the train was negligently jerked with such violence that he was thrown off and injured. There was no evidence that the jerk of the train was other than usual in starting it under like circumstances, or attributable to anything other than the taking up of the slack. *Held*, that defendant was entitled to an instruction withdrawing the question of negligence as to such jerk of the train from the jury.—*Saxton v. Missouri Pac. Ry. Co.*, 72 S.W. 717, 98 Mo. App. 494.

**App. 1907.** In an action for injuries to plaintiff while alighting from a train after assisting his daughter to board it, evidence *held* to justify the submission of the case to the jury.—*Bond v. Chicago, B. & Q. Ry. Co.*, 99 S.W. 30, 122 Mo. App. 207.

320 (30). Proximate cause of injury.

**Sup. 1909.** In an action for the death of a passenger by being thrown against a stove by derailment, whether intestate's death was proximately caused by the injuries sustained *held* for the jury.—*MacDonald v. Metropolitan St. Ry. Co.*, 118 S.W. 78, 219 Mo. 468, 16 Ann. Cas. 810.

**Sup. 1924.** Conflicting testimony as to whether plaintiff's hysterical malady was caused by collision of street cars or existed prior to accident *held* to make cause of her physical infirmity a question for the jury.—*Weissman v. Wells*, 267 S.W. 400, 306 Mo. 82.

Whether plaintiff suffered any physical injuries in street car collision which contributed to her hysterical condition *held* question for jury under conflicting evidence.—*Id.*

**Sup. 1925.** Whether injuries resulted from negligent or excessive speed *held* for jury.—*Hamilton v. Missouri Pac. Ry. Co.*, 270 S.W. 100.

**Sup. 1926.** Whether unprecedented rainfall was sole cause of train wreck resulting in injury to mail clerk *held* for jury.—*Bond v. St. Louis-San Francisco Ry. Co.*, 288 S.W. 777, 315 Mo. 987.

**Sup. 1927.** Whether supports were washed from bridge through which train crashed by act of God *held* for jury.—*State ex rel. St. Louis & San Francisco Ry. Co. v. Dues*, 290 S.W. 425, 316 Mo. 474, quashing certiorari (App. 1926) *Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525.

Whether external cause alleged by defendant as causing injury was sole cause is question for jury.—*Id.*

**Sup. 1927.** Whether negligence of engineer in failing to see open switch and to stop train was proximate cause of injuries to passenger *held* for jury.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**Sup. 1928.** Evidence *held* to require submission of issue relative to death resulting from injury to passenger in train wreck (Rev. St. 1919, § 4217).—*Schulz v. St. Louis-San Francisco Ry. Co.*, 4 S.W.(2d) 762, 319 Mo. 8.

**App. 1903.** Whether a carrier's negligence in carrying a passenger beyond his station was the proximate cause of injuries received while walking back to the station was a question for the jury.—*Rawlings v. Wabash R. Co.*, 71 S.W. 535, 97 Mo. App. 511.

**App. 1904.** In an action by a passenger against a railroad for injuries alleged to have been caused by defendant's negligence in jerking the train as plaintiff had arisen from his seat to alight, evidence considered, and *held* to justify submission to the jury of the issue as to whether the jerk was the proximate cause of the injury.—*Moorman v. Atchison, T. & S. F. Ry. Co.*, 78 S.W. 1089, 105 Mo. App. 711.

**App. 1915.** Whether a passenger was injured in a collision between cars *held* for the jury.—*Gillogly v. Dunham*, 174 S.W. 118, 187 Mo. App. 551.

**App. 1918.** Evidence *held* to present a jury question whether a street car passenger's injuries and subsequent paralysis were the proximate result of her being thrown to the floor of a car when it started with undue violence.—*Shafer v. Kansas City Rys. Co.*, 201 S.W. 611.

**App. 1920.** In action against suburban railroad for injuries to prospective passenger, struck by car on station platform, where it was claimed that railroad was not liable, even if negligent in operating car without headlight, and in failing to give warning of approach to station, on theory that proximate cause of injury was the pushing of passenger onto track by the crowd, whether negligence of railroad was a proximate cause *held* for jury.—*Willi v. United Rys. Co. of St. Louis*, 224 S.W. 86, 205 Mo. App. 272.

#### ⚡ 320 (31). Companies or persons liable for injuries.

*See explanation, page iii.*

#### ⚡ 320 (32). Damages.

**App. 1923.** In action for injuries to a passenger from an assault by a street car conductor with an iron bar, in view of disparity between the age and size of the conductor and plaintiff, the conductor being a young man of 22, and plaintiff being 63 and weighing only 148 pounds, notwithstanding plaintiff's conduct may have started trouble between them, the question of punitive damages should not have been eliminated, and refusing an instruction to that effect was not error.—*Hunter v. Kansas City Rys. Co.*, 248 S.W. 998, 213 Mo. App. 233.

#### ⚡ 321. — Instructions.

Contributory negligence, *see post*, ⚡ 348.

#### ⚡ 321 (1). In general.

**Sup. 1806.** In a suit by a passenger, injured by reason of a railroad train being

thrown into a chasm by the burning of a bridge, the bridge being burned by a public enemy and the conductor being prevented from receiving notice from the agents of the road by their being driven off or overawed by the enemy, an instruction confining the issue of negligence to the particular case in the running of the cars, and telling the jury that "if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same, where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the carrier was not liable for the injury," was improperly refused, as it presented to the jury the principle that the defendant was not liable for mere accident, in the absence of any want of that degree of care and prudence which the law requires.—*Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

**Sup. 1893.** Where, in an action against a street railway company by a passenger to recover for injuries sustained while alighting from a car, the conductor in charge of the car confessed to actual knowledge of the facts, it was not error to omit from an instruction a phrase with reference to what the conductor might have known by the exercise of due care.—*Jackson v. Grand Avenue Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**Sup. 1904.** In an action against a railroad company for injuries to a passenger, alleged to have been caused by the negligence of defendant in failing to have servants at a station to direct plaintiff to his train, so that he got on the wrong train, and, in attempting to leave it while in motion, slipped on a platform which defendant had negligently allowed to become greasy, there was evidence in support of both allegations of negligence, and defendant requested an instruction that, if there was no grease at the point where plaintiff fell, his fall was due to some other cause than grease, the verdict must be for defendant. *Held*, that this instruction was properly modified, so as to state that under such circumstances the verdict must be for defendant "as to this specification of negligence."—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

**Sup. 1912.** Instruction in passenger's action for injuries *held* not to have submitted negligence in another respect than that charged by the petition, or to have invoked

the "last chance" doctrine.—*Stauffer v. Metropolitan St. Ry. Co.*, 147 S.W. 1032, 243 Mo. 305.

**Sup. 1920.** In an action for injuries to plaintiff while boarding a car of defendant railroad where there was evidence that he was not near the car at the time he claimed to have been injured, and did not call a doctor for four months, or notify the railroad of his injury until still later, an instruction that the fact he was injured at some time was not proof that he was injured at the time and in the manner he claimed, was not erroneous, as not supported by evidence.—*Ulrich v. Chicago, B. & Q. R. Co.*, 220 S.W. 682, 281 Mo. 697.

**App. 1905.** An instruction that defendants were liable, if plaintiff's injury was caused by "any failure" on their part to exercise care and precaution in the management of the elevator, as distinguished from a failure of duty "shown by the proof," was error.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

**App. 1905.** Where, in an action for personal injuries, the testimony does not show beyond dispute any fact rendering it impossible, according to the laws of nature, for the accident to have occurred from defendant's negligence, unless the injured person was also negligent, an instruction requiring the jury to determine the issues and to weigh the testimony of the witnesses according to the probability thereof is sufficient, without a charge that the finding must be in accordance with the physical facts.—*Schmitt v. St. Louis Transit Co.*, 90 S.W. 421, 115 Mo. App. 445.

**App. 1917.** In action against interurban railway for injuries to passenger in partial derailment, instruction submitting hypothesis of plaintiff's having been passenger, that there was collision, and that she received injuries complained of, and then placing burden of proof on defendant, was not erroneous.—*Kilroy v. Kansas City & K. V. Ry. Co.*, 195 S.W. 522.

**App. 1921.** In a suit for injury alleged to have been caused by being pushed under a moving car by a crowd struggling to get on at a loading dock, an instruction for plaintiff as to plaintiff's relation while waiting thereon and as to defendant's duty as to protecting passengers and its liability in the circumstances *held* not to be confusing or misleading and to be within the petition and the evidence and sufficiently specific.—*Grubb v.*

*Kansas City Rys. Co.*, 230 S.W. 675, 207 Mo. App. 16.

321 (2). Existence of relation of carrier and passenger.

**Sup. 1889.** Where an instruction requires a finding that plaintiff was on the train with the knowledge and consent of the agent in charge of it, it cannot be objected that it does not submit the question whether he was rightfully on the train.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 11 S.W. 751, 99 Mo. 263, 6 L. R. A. 409.

**Sup. 1906.** Where, in an action against a railroad for wrongful death resulting from injuries received by deceased in a collision occurring after the train whereon he was a passenger had left the station to which he had purchased transportation, it was conceded that up to the time of reaching the station he was a passenger, an instruction, requiring the jury to find for plaintiff if they believed that deceased at the time of the accident was a passenger on defendant's train, and further charging that if they believed, from all the facts and circumstances in evidence, that deceased determined to continue his journey to the station whereat he resided, and remained on the train for that purpose, the fact that he had only paid his fare to the former station was no defense to the suit, sufficiently required the jury to find that deceased was a passenger at the time of the accident.—*Anderson v. Missouri Pac. Ry. Co.*, 93 S.W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

**Sup. 1908.** Under a petition charging the negligent starting of the street car which plaintiff was boarding, by the carrier's invitation, at a point where passengers were discharged and received, it was error to give an instruction allowing a recovery, under the humanitarian or last clear chance doctrine, and without the relation of passenger and carrier necessarily existing.—*Peterson v. Metropolitan St. Ry. Co.*, 111 S.W. 37, 211 Mo. 498.

**Sup. 1913.** An instruction which failed to define "passenger" *held* erroneous in an action for injuries received by one while attempting to board a car.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**Sup. 1920.** In action for injuries to plaintiff boarding train, instruction that plaintiff was a passenger when endeavoring to board train *held* proper.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**Sup. 1927.** Instruction *held* misleading as subject to interpretation that one must be accepted as passenger after indicating intention to board car.—*Erny v. Wells*, 293 S.W. 119, 316 Mo. 798.

**App. 1910.** In an action for injuries to plaintiff in alighting from a train, where plaintiff's right to recover in the absence of a contract of carriage was not raised in the pleadings, a requested charge that if defendant was not bound to stop its train where plaintiff attempted to alight, to allow passengers to alight, in the absence of a contract to stop for that purpose, and if plaintiff was riding on the train from the point to which his ticket read to the place where he alighted without payment of fare, he took the risk of alighting safely, though defendant's agent permitted him to ride without payment of fare was erroneous as omitting the element of notice to defendant's servants that plaintiff intended to alight where he did, since whether he had or had not a contract of passage to the place where he alighted, defendant owed him due care; he still being a passenger.—*Cornell v. Chicago, R. I. & P. R. Co.*, 128 S.W. 1021, 143 Mo. App. 598.

**App. 1913.** In an action for an assault which plaintiff claimed defendant's chauffeur had committed on him while he was a passenger in defendant's vehicle, where there was evidence that plaintiff entered the vehicle with the intention of never paying his fare, the refusal of instructions presenting the issue that the relation of carrier and passenger never existed is erroneous.—*Fornoff v. Columbia Taxicab Co.*, 162 S.W. 699, 179 Mo. App. 620.

**App. 1920.** In action by one injured when boarding a street car, an instruction, requiring a finding of all the facts necessary to constitute plaintiff a passenger invited to board the car and attempting to do so in response to that invitation, *held* to clearly submit the issue of whether plaintiff was a passenger.—*Vogts v. Kansas City Rys. Co.*, 228 S.W. 526.

**App. 1921.** The objection that an instruction in an action for injuries to a street car passenger, who was injured while alighting from the car, was erroneous for failure to define the word "passenger," is untenable.—*McMahon v. Kansas City Rys. Co.*, 233 S.W. 64.

#### ←321 (3). Degree of care required in general.

**Sup. 1891.** An instruction that the law imposes the "utmost" care on a common cur-

rier of passengers, though not the most preferable form, is not erroneous, where followed by an instruction that the carrier is not an insurer of the safety of passengers, and that negligence on its part must be shown.—*Smith v. Chicago & A. R. Co.*, 18 S.W. 971, 108 Mo. 243.

**Sup. 1900.** In an action against a street-railway company for injuries caused by suddenly starting a car on which plaintiff was a passenger after slowing it down to enable him to alight, it is not error to instruct that defendant's employés were chargeable with a high degree of care, such as practical and skillful railroad men would have exercised under similar circumstances, though there is no evidence showing what practical and skillful railroad men would do under such circumstances.—*Grace v. St. Louis R. Co.*, 56 S.W. 1121, 156 Mo. 295.

**Sup. 1908.** An instruction, taken as a whole, *held*, to correctly state the degree of care required of defendant toward plaintiff as a passenger.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

**Sup. 1909.** It is usual to use the word "highest" in instructions upon the degree of care required toward passengers, instead of "utmost," and the former should be used, though there may be but slight difference in their meaning.—*Quinn v. Metropolitan St. Ry. Co.*, 118 S.W. 46, 218 Mo. 545.

**Sup. 1909.** An instruction, declaring that the obligation of a carrier to a passenger was to use the highest practicable degree of care of very prudent, skillful, and experienced men engaged in that kind of business, is not rendered bad by the use therein of the words "and experienced."—*Loftus v. Metropolitan St. Ry. Co.*, 119 S.W. 942, 220 Mo. 470.

**Sup. 1912.** Instruction as to degree of care required *held* not to be too general or to impose too high a degree of care on the company, especially in connection with other instructions.—*Stauffer v. Metropolitan St. Ry. Co.*, 147 S.W. 1032, 243 Mo. 305.

**Sup. 1912.** An instruction that, if the carrier exercised all the care and prudence that were reasonably practicable, it was not negligent, was erroneous; the word "reasonably" rendering it confusing.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S.W. 91, 245 Mo. 598.

**Sup. 1918.** An abstract instruction that as to a passenger a carrier and its employés were bound to use the highest degree of care

that a careful person would use, etc., *held* correct.—*Breen v. United Rys. Co. of St. Louis*, 204 S.W. 521.

**Sup. 1921.** In action for injuries to passenger, instruction requiring railroad employees to have exercised the highest practicable care and skill "which might reasonably be expected of ordinary careful and prudent persons engaged in like business in running and operating its cars" *held* not objectionable because of use of words "which might reasonably be expected."—*Scott v. Kansas City Rys. Co.*, 229 S.W. 178.

**Sup. 1924.** In passenger's action for injuries in street car collision, an instruction that defendant railway was not required to exercise any degree of care or foresight that was not reasonably practicable *held* erroneous as not stating the proper measure of care.—*Weissman v. Wells*, 267 S.W. 400, 306 Mo. 82.

**App. 1883.** An instruction, in an action for the negligent death of plaintiff's intestate, which authorized a verdict for plaintiff if defendants failed to exercise due care, is not erroneous for failing to define due care, where other instructions define the term.—*Hunt v. Missouri R. Co.*, 14 Mo. App. 160.

**App. 1891.** In an action against a street railroad for injuries to a passenger, a charge that, if defendant's driver could have prevented the injury by the exercise of "reasonable care and prudence" on his part, etc., was not erroneous.—*Buck v. People's St. Ry. & Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1898.** In an action against a street railway company for personal injury to a passenger, an instruction that the defendant was required to exercise a high degree of care, such as would have been exercised by very careful and skillful railroad employees under like or similar circumstances, was not objectionable on the ground that it authorized the jury to consider the duty exacted of the servants of steam railroad companies, as well as of street railroad companies, inasmuch as the reference to "similar circumstances" limited the scope of the instruction to the employees of railroads similar to the one involved in the action.—*Posch v. Southern Electric R. Co.*, 76 Mo. App. 601.

**App. 1900.** Where an instruction declared what it is conceded was the proper measure of duty imposed by law on defendant while engaged in operating its railway,

and the jury was further told that, if it found the facts existing which were therein specified, then defendant had neglected to fill the measure of duty required of it by law, and was therefore liable, the instruction is not erroneous, and, even if it were, defendant is not harmed thereby.—*Hansberger v. Sedalia Electric Ry., Light & Power Co.*, 82 Mo. App. 566.

**App. 1903.** An instruction in an action for injury to a passenger on a street car that a common carrier is bound to use the highest degree of care for the safety of its passengers, followed by an instruction that if the motorman was negligent, and his negligence caused the car to lurch, throwing plaintiff into the street, plaintiff could recover, unless she was not exercising ordinary care, is not erroneous because the term "highest degree of care" is not defined.—*Ilges v. St. Louis Transit Co.*, 77 S.W. 93, 102 Mo. App. 529.

**App. 1903.** In an action by a passenger for injuries, an instruction that defendant is held to "the utmost care, skill, and vigilance," accompanied by a recital of the particular facts which will sustain a recovery, is not ground for reversal, in the absence of a request for amendment, though it does not define the degree of care specified as that which would be exercised under the circumstances by very cautious men.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

**App. 1909.** An instruction reciting generally the duty of a carrier toward a passenger *held* not objectionable, where applied to the particular case by other instructions.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497, 135 Mo. App. 254.

**App. 1917.** Instruction requiring highest degree of care of street car company commensurate with danger to which any passengers were exposed was not too broad where court specifically required jury to find particular degree of care required as to deceased.—*Cooley v. Dunham*, 195 S.W. 1058, 196 Mo. App. 399.

**App. 1920.** An instruction that it was the duty of a carrier to use that high degree of care which a person of ordinary prudence would use under like circumstances to well and safely carry a passenger is correct and not objectionable as making the carrier an insurer of the passenger's safety.—*Rooker v. Deering Southwestern Ry. Co.*, 226 S.W. 69, 206 Mo. App. 79.

←321(4). Acts of carrier's employes, fellow passengers, or third persons.

**Sup. 1890.** Where the jury are told that the company was liable if the misconduct of the conductor gave the passenger reasonable cause to jump from the train, it is error to charge that reasonable cause was a cause sufficient to have induced the act, having regard to the passenger's intelligence and experience in life, and his situation and surroundings at the time, the company being liable only for the natural and probable consequences of the misconduct of the conductor, who was not chargeable with knowledge of the passenger's "intelligence and experience in life."—*Spohn v. Missouri Pac. Ry. Co.*, 14 S.W. 880, 101 Mo. 417.

The error is not cured by an instruction requiring the cause to be such "as reasonably to have induced a man of ordinary prudence to believe his life in danger, or that he was in danger of great bodily harm," nor by an instruction that the company was not liable unless the misconduct of the conductor and the others "was such as to convince a reasonable man that the threats would be carried into immediate execution."—*Id.*

**Sup. 1904.** In an action against a railroad company for personal injuries caused by plaintiff's slipping as he stepped from a moving train, it appeared that plaintiff had asked the porter if that was the train to New York, and, on being told that it was, had gotten on, only to discover that it went by a different route from that over which his ticket entitled him to travel, though defendant railroad company operated both routes. On discovering the mistake, the porter told plaintiff to jump off, and in doing so plaintiff slipped on a greasy platform and was injured. *Held*, that it was proper to instruct that the porter should be regarded as an employe of the company, so far as concerned the rights and duties of plaintiff and defendant towards each other, and that if, after plaintiff discovered he was on the wrong train, the porter told him to jump off, and the train was going at such speed that it was dangerous to do so, plaintiff being unaware of the fact, and not able to learn of it by the exercise of ordinary care, though the porter could by such care have known of the danger, and the porter by such conduct omitted to exercise ordinary care, defendant was guilty of negligence.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

An instruction that, if plaintiff got on the wrong train through failure of defend-

ant to direct him, plaintiff being told by a porter that it was the train he desired to take, and afterwards, on further explanation, told that it was not, and directed to jump off, he was entitled to recover was not objectionable on the ground that it declared the act of the porter to be negligence as a matter of law.—*Id.*

**Sup. 1904.** In an action for death of a passenger from injuries received in an altercation with the conductor there was evidence that, after deceased struck the conductor, the latter began "defending himself" by beating deceased with the butt end of a pistol as he was leaving the car, and followed him, still beating him, to the sidewalk. Defendant's evidence showed that the conductor was first assaulted by deceased, and then dragged off the car by him. *Held*, that an instruction that if deceased assaulted the conductor as he was alighting, the conductor was justified in defending himself, and if he did defend himself from such assault, and while so doing there was a fight on the street, off the car, between the deceased and the conductor, in which deceased was shot, plaintiff could not recover, should not have been given.—*O'Brien v. St. Louis Transit Co.*, 84 S.W. 939, 185 Mo. 263, 105 Am. St. Rep. 592.

An instruction that if deceased cursed defendant's street car conductor while deceased was alighting from the car, and at that time the conductor had not struck deceased nor cursed him, such conduct constituted a breach of the peace; and if the conductor, in resenting such insult, engaged in a fight with deceased on the street, in the course of which deceased was shot, plaintiff was not entitled to recover from defendant—was error, as eliminating as immaterial whether the conductor was dragged from the car, as defendant's evidence tended to prove, or voluntarily followed deceased to the sidewalk, and there attempted to preserve the peace, according to plaintiff's evidence.—*Id.*

**Sup. 1916.** In an action for injuries to a passenger who jumped from moving train to escape other passengers, an instruction *held* erroneous as imposing on the carrier the absolute duty to prevent injury from other passengers.—*Utterback v. St. Louis & S. F. Ry. Co.*, 189 S.W. 1171.

**Sup. 1919.** In action against street railroad for injuries to passenger, in view of evidence, instruction that mere fact the conductor was on duty and in charge of the car



did not deprive him of his right to defend his person, and that, if plaintiff attempted to strike him without being first assailed, plaintiff could not recover, *held* proper, though plaintiff's evidence was to the contrary.—*Wiard v. Dunham*, 210 S.W. 873.

**App. 1881.** In an action against a carrier for injuries to a passenger, instructions considered, and *held*, that defendant has no reason to complain.—*Chance v. St. Louis, I. M. & S. Ry. Co.*, 10 Mo. App. 351.

**App. 1894.** In an action for personal injuries received in jumping from a moving train in the belief that serious danger was impending, the court instructed that if a signal whistle to stop the train was sounded at a place remote from a station, switch, or siding, and that the brakeman responded to the signal in an excited or unusual manner and called out to jump, and the circumstances of the place and manner of the employes, together with the order or exclamation, induced plaintiff to jump from the train, and he was injured, the finding should be for plaintiff. *Held* that, as the evidence did not show that plaintiff heard the whistle or that he knew that the train was remote from a station, etc., the instruction was erroneous.—*Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

**App. 1902.** Where, in an action by a passenger, the defense was that any injuries received from servants of the company were caused in defending themselves against an assault by plaintiff, any error in refusing an instruction submitting the issue of whether plaintiff was a trespasser on the car or not was immaterial, where the court instructed, that if plaintiff began the assault, he could not recover, as he had no greater right to commit an assault, if he was a passenger, than if he was a trespasser.—*Murphy v. St. Louis Transit Co.*, 70 S.W. 159, 96 Mo. App. 272.

**App. 1909.** In an action for injuries to a passenger, an instruction that if the conduct of defendant's servants, as shown by the evidence, substantially stated, was negligent, plaintiff could recover was proper.—*Dye v. Chicago & A. R. Co.*, 115 S.W. 497, 135 Mo. App. 254.

**App. 1914.** In an action for personal injuries from being thrown from a car by its sudden start, or by being pushed off by other passengers, instructions submitting the matter of plaintiff being pushed off by other passengers *held* not without support in the evidence.—*Stoltze v. United Rys. Co. of St. Louis*, 166 S.W. 1102, 183 Mo. App. 304.

**App. 1914.** Where plaintiff was assaulted by defendants' ticket agent during the purchase of a transportation ticket, a request to charge that, if the assault grew out of a personal difficulty between plaintiff and defendants' agent, plaintiff could not recover, was properly refused.—*Bledsoe v. West*, 171 S.W. 622, 186 Mo. App. 460.

**App. 1917.** An instruction on the damages for an assault by a conductor on a passenger, *held* fatally defective, for failure to distinguish the wrongful acts committed by the conductor, from those which were rightful.—*Briggs v. Lusk*, 190 S.W. 380.

**App. 1920.** In an action against a street railway company for damages from assault by its employe, an instruction that, if plaintiff was at the place in question waiting for the car, and asked defendant's employe stationed there for information in regard to the car, and without cause such employe struck plaintiff and injured him, they should find for plaintiff, provided the employe was then acting in line of his duty, *held* proper.—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo. App. 262.

**App. 1921.** An instruction in an action against a carrier for damages for assault and battery requiring the conductor to use no more force than was reasonably necessary to protect himself *held* proper as against a claim that it should have permitted him to use whatever force "appeared to him" to be reasonably necessary.—*Parris v. Deering Southwestern Ry. Co.*, 227 S.W. 1071.

**App. 1921.** In an action for injuries caused by being pushed under a moving street car by a crowd struggling to get on, defendant's instruction that, if the motorman and conductor did not know persons were riding on the front steps, then, even if such persons struck and injured plaintiff, defendant is not liable, and verdict for plaintiff could not be returned on account thereof, was properly refused, though the evidence conclusively shows that plaintiff was not knocked down by such persons who jumped on as the car went through the crowd, since, if that was true, there would be no room for an instruction submitting the question, and besides it erroneously omitted a necessary element, namely, whether the motorman could have seen the persons on the step, and hence could not counteract evidence that persons did jump on and knocked persons down with their bodies as the car passed.—*Grubb v. Kansas City Rys. Co.*, 230 S.W. 675, 207 Mo. App. 16.

In an action for injury from being pushed under a street car by crowd struggling to get on at loading platform, defendant's instruction that defendant was not bound to provide a railing or other means to keep people off the track and was not guilty of negligence in failing to so do, thus seeking to withdraw matters of which there was ample evidence in support of the issue of defendant's negligence in failing to protect plaintiff against the surging crowd, was properly refused; for, even if defendant was entitled to an instruction that it was not obliged to provide means to "forcibly keep people off its tracks," such instruction should be drawn so as not to mislead or confuse the jury, and no one was contending that such was defendant's duty.—

In a suit for injury to a passenger pushed under a moving street car by a crowd struggling to get on, an instruction that, if plaintiff was knocked down by some one running or pushing through the crowd, and was pushed or knocked under the wheels of the car, defendant was not liable would allow the jury to find for defendant, though plaintiff was injured by the movement of the crowd, and was properly modified to state that, if plaintiff was knocked down by a man running in the opposite direction from the crowd as defendant's witnesses claimed, defendant was not liable.—Id.

⇐321(5). Condition of carrier's premises.

Sup. 1891. Plaintiff's husband, while entering a car on defendant's elevated railroad, was carried along by the moving train, between it and the railing of the station platform, and dropped to the street below, and was killed. The railing was 12 inches from the car, and the only evidence of defect was that about three weeks after the accident defendant reduced the space between the car and railing to 6 inches. The railing was necessary, and reducing the space did not lessen the danger. *Held*, that an instruction that it was the duty of defendant to maintain a safe structure, and that, in determining whether the train was held for a reasonable time to enable deceased to get on, the jury could consider whether the railing was reasonably safe, was error.—*Evans v. Interstate Rapid Transit Ry. Co.*, 17 S.W. 489, 106 Mo. 594.

App. 1886. In an action against a carrier for injuries sustained by a passenger, the court instructed that if the jury believed that plaintiff reached a certain town as a passenger in the nighttime, and that defendant's

station was surrounded by a platform higher than the ground, and that no railing or other barrier had been constructed or maintained around the edge of the platform to keep people from walking off, and that defendant failed to have lights on the platform, and that plaintiff, in passing from the train across the platform, walked off, without fault on his part, and was injured, they should find for plaintiff. *Held*, that the instruction was not objectionable as directing the jury that they could find the existence of negligence from the mere absence of the railing.—*Stafford v. Hannibal & St. J. R. Co.*, 22 Mo. App. 333.

App. 1923. In an action for injuries to a passenger sustained in passing through depot door, instruction that it was negligence for the railroad to have on its door a strong spring, which made the passage through the door dangerous to "any person," *held* not erroneous because of the use of the words "any person," since the jury could not have been misled by the use of such words.—*Martin v. Missouri Pac. R. Co.*, 253 S.W. 1083.

⇐321(6). Taking up passengers in general.

Sup. 1904. Testimony by plaintiff and a person who was with him, when he was looking for his train, that there were no ushers to direct plaintiff to his train, was sufficient to justify a charge that defendant was liable if it failed to make reasonable arrangements for directing him to his car.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

Sup. 1915. In action against street railroad for personal injuries, instruction as to plaintiff's right to recover if he had boarded moving car in exercise of reasonable care for his own safety *held* misleading and not authorized by petition.—*Northam v. United Rys. Co. of St. Louis*, 176 S.W. 227.

Sup. 1927. Instruction in personal injury action against street railroad *held* to have required finding that car was running at excessive speed at point of accident.—*Unterlacher v. Wells*, 296 S.W. 755, 317 Mo. 181.

App. 1891. In an action against a carrier for injuries to a passenger, a charge that it was defendant's duty to stop the car at the point "where plaintiff stepped on the train" was erroneous, where one of the controverted facts was whether plaintiff so stepped on the train or not.—*Meriwether v. Kansas City Cable Ry. Co.*, 45 Mo. App. 528.

**App. 1903.** An instruction authorizing a recovery for injuries in attempting to board a street car, if the plaintiff believed the car was stopping for passengers, is not objectionable as allowing the right to board it irrespective of its speed, whether the evidence showed that it was moving very slowly when he attempted to board it.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

In an action for injuries in attempting to board a street car at a certain point, an instruction that cars should stop at that point was not objectionable as imposing the duty, whether there were any passengers there or not.—*Id.*

**App. 1916.** An instruction that defendant carrier's liability continues not only while its passengers are in transit, but while entering the cars at stations, *held* not erroneous or misleading in using the word "liability" instead of "duty."—*Witham v. Lusk*, 190 S.W. 403.

**App. 1920.** In action by one injured when boarding a street car either by starting of the car or by shutting the vestibule door before plaintiff had boarded the car, *held*, there was no error in an instruction in not defining the word "negligently," since the facts which the jury, under the instruction, had to find before they could find for plaintiff made the starting of the car or shutting of the door negligent, and since defendant used the same term without definition and if it were deemed necessary the defendant would have defined it but did not.—*Vogts v. Kansas City Rys. Co.*, 228 S.W. 526.

**App. 1926.** Instruction on care owed plaintiff attempting to enter street car *held* not to assume that he was a passenger, and not erroneous as requiring highest degree of care without defining "passenger," as it required a finding of facts which were tantamount thereto.—*Amos v. Fleming*, 285 S.W. 134, 221 Mo. App. 559.

**App. 1928.** Defendant's instruction *held* not objectionable as requiring finding of greater degree of negligence by defendant than was necessary for plaintiff to recover.—*Taylor v. Wells*, 7 S.W.(2d) 424.

321 (7). Starting or moving car while passenger is boarding same.

**Sup. 1882.** In an action against a railroad company for injuries sustained by a passenger, owing to defendant's servants not having stopped a train long enough to per-

mit plaintiff to board it, the instruction should have restricted the liability of defendant to negligent acts committed by its servants after they became aware of the danger to which plaintiff's negligence had exposed him.—*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475.

Where, in an action against a carrier for injuries sustained by a passenger, owing to a train having been stopped an insufficient length of time to enable plaintiff to get on, there was evidence tending to show that the conductor saw plaintiff attempting to get on, and started the train while plaintiff was in the act of getting on, *held*, that an instruction ignoring the fact that the conductor may have seen plaintiff attempting to get on the train when it started was erroneous.—*Id.*

**Sup. 1907.** In an action against a railway company for injuries to a passenger, where plaintiff's testimony tended to show that the car had stopped at the proper place to receive passengers, that there was an implied invitation to enter, that while she, in the usual way and with proper care, was entering the car, there was a sudden movement forward throwing her down with one foot under the wheels, and defendant's testimony tended to show either that plaintiff was forced against and under the car by a crowd pushing to get on, or that she negligently undertook to mount a moving car before it reached the stopping place, and was injured by her own inadvertence, each party was entitled to instructions on their respective theories of the case.—*Flaherty v. St. Louis Transit Co.*, 106 S.W. 15, 207 Mo. 318.

A general instruction for plaintiff, which, among other things, charged that, if defendant's servants in charge of the car received plaintiff as a passenger thereon, and if while she was on the run-board thereof, etc., they caused or suffered the car to start and move forward, etc., in the absence of contributory negligence, plaintiff could recover, in effect requires the jury to find that plaintiff was invited to enter the car, and had accepted the invitation, and is not open to the objection that it permits plaintiff to recover without a finding that the car had stopped when plaintiff sought to enter.—*Id.*

**Sup. 1914.** An instruction in an action for the death of a passenger thrown from a car while attempting to board it, submitting the question of whether the car stopped a reasonable time, *held* not objectionable.—

**Tawney v. United Rys. Co. of St. Louis**, 172 S.W. 8, 262 Mo. 602.

**App. 1900.** An instruction that if "at the time plaintiff undertook to board the defendant's car, the motorman in charge of said car saw plaintiff and knew that he wanted to get on said car as a passenger, then it was the duty of defendant to stop the car, and not to move it until plaintiff was in a place of safety on said car," is a mere harmless abstraction.—**Hansberger v. Sedalia Electric Ry., Light & Power Co.**, 82 Mo. App. 566.

**App. 1902.** Where plaintiff claimed that she was injured by the negligence of defendant street car company in suddenly starting its car while she was boarding it at a crossing, a charge submitting to the jury whether the street corner was a regular station for receiving and discharging passengers was not erroneous on the ground that there was no claim that the corner was a "station"; that word being used in the instruction in the sense of "place."—**Maxey v. Metropolitan St. Ry. Co.**, 68 S.W. 1063, 95 Mo. App. 303.

**App. 1903.** An instruction declaring it negligence, after stopping a street car to let on a passenger, to start it before he had a reasonable time "to get upon said car and to a place of safety therein," was proper, and was not inconsistent with an instruction stating the duty to hold the cars stationary a reasonable time to enable persons "safely to board such cars."—**Maguire v. St. Louis Transit Co.**, 78 S.W. 838, 103 Mo. App. 459.

**App. 1904.** In an action against a street railroad for injuries to a passenger, an instruction authorizing a recovery if the car had stopped to receive him as a passenger, and was suddenly started while he was boarding it, and failing to take into consideration the questions of willfulness or negligence on the part of defendant's servants, was erroneous.—**Maggioli v. St. Louis Transit Co.**, 83 S.W. 1026, 108 Mo. App. 416.

**App. 1905.** Where, in an action for injuries received while attempting to board a car, plaintiff's evidence showed that the injuries resulted from the sudden starting of the car, and defendant's evidence showed that plaintiff walked off the end of the platform from which passengers were received without touching the car, instructions directing a verdict for plaintiff if the car started while he was in the act of boarding it, and authorizing a verdict for defendant if

plaintiff fell from the platform before touching the car, or if he relied on a third person in boarding the car, and he was guilty of negligence directly contributing to the injury, properly submitted the case to the jury.—**Harr v. St. Louis & S. R. Co.**, 90 S.W. 107, 114 Mo. App. 425.

An instruction, in an action for injuries received while attempting to board a car, that if, while plaintiff was boarding a car, defendant's motorman started the car, so as to drag plaintiff from the platform from which defendant was accustomed to receive passengers, thereby injuring him, plaintiff was entitled to recover, required the jury to find facts constituting negligence, and the omission of the word "negligence" was not erroneous.—**Id.**

**App. 1907.** Where, in an action for injuries to a passenger, plaintiff claimed that the car started suddenly while she was boarding it, an instruction submitting the question whether the car was suddenly started, and that defendant's servants knew, or by the exercise of "proper care" should have known, that plaintiff was on the step, was not erroneous because of the phrase "proper care"; the requisite care having been previously properly stated.—**Randolph v. Metropolitan St. Ry. Co.**, 102 S.W. 1085, 125 Mo. App. 620.

**App. 1910.** In an action against a street railroad for injuries to plaintiff, a passenger, while attempting to board a car, through the sudden starting thereof, an instruction that, if the car stopped a reasonable length of time for one to board it, plaintiff could not recover, though she fell while attempting to board, was improper as ignoring the knowledge of the car crew that plaintiff was attempting to board, and as excusing them, though they willfully started the car; 'it appearing that plaintiff had signaled the car to stop and was in the act of boarding it.—**Boland v. United Rys. Co. of St. Louis**, 131 S.W. 362, 150 Mo. App. 665.

**App. 1916.** In an action for injuries to plaintiff by not stopping a mixed train for sufficient length of time to enable him to safely board the train, instruction *held* not erroneous as containing a general charge of negligence in addition to the specific charge.—**Witham v. Lusk**, 190 S.W. 403.

**App. 1917.** In an action for injuries caused by sudden starting of a street car which plaintiff was boarding, allegations of

petition *held* to justify inclusion in an instruction of the element of "failure to warn of a sudden start."—*Beurskens v. Dunham*, 193 S.W. 855.

In an action for injuries caused by sudden starting of a street car which plaintiff was boarding, *held*, that an instruction which permitted plaintiff to recover on account of alleged negligent continuance and forward movement of car and dragging plaintiff upon pavement and against the car was not error.—*Id.*

**App. 1919.** In passenger's action for injuries by a violent jerk of train while boarding it, an instruction, submitting as grounds of negligence the failure to stop a sufficient length of time to enable plaintiff to board, and negligence in starting, was not erroneous, although failure to stop a sufficient length of time was not the proximate cause of the injury.—*Burkett v. Missouri Pac. R. Co.*, 208 S.W. 104.

**App. 1924.** In an action for personal injuries to plaintiff boarding a street car, alleged to have been caused when defendant's employes "carelessly and negligently and without warning caused said car to plunge violently forward," an instruction submitting the question of negligence of defendant's servants in the respect alleged *held* not prejudicially erroneous for failure to submit the issue of their failure to warn plaintiff; the negligence alleged and covered by the instruction being deemed sufficient in itself to support a recovery, regardless of failure to warn.—*Findley v. Wells*, 260 S.W. 506.

321 (8). **Sufficiency and safety of means of transportation.**

**Sup. 1886.** In an action against a street railway company for damages for killing plaintiff's minor child, an instruction given the jury describing the kind of gates that defendant was bound by statute to provide for the front platforms of its cars, and that if, by the neglect of the driver, "a gate" was not provided to the front platform on which deceased was riding, whereby he came to his death, without negligence on his part, defendant is liable, is not objectionable because of the use of the words "a gate," instead of "such gate," as the kind of gate defendant was required to keep was explained in the instruction.—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. 332.

**Sup. 1893.** Where, in an action for injuries on a street car, the plaintiff is entitled

to an instruction requiring defendant to use the utmost practicable care and diligence with reference to its cars, including its brakes and grip irons, for the safety of its passengers, and entitling him to recover if the injuries complained of were received by reason of the defective grip or brakes, without fault on plaintiff's part directly contributing thereto, the refusal of such instruction was not cured by an instruction relating to the alleged negligence of the persons in charge of the trains in the use of such appliances as they had, and not to negligence in furnishing or keeping the appliances in repair.—*Sharp v. Kansas City Cable Ry. Co.*, 20 S.W. 93, 114 Mo. 94.

**Sup. 1896.** Where, in an action by a husband for injuries to his wife occasioned by a fall received by her in alighting from an open summer car, there was no evidence that the car was defective or dangerously constructed, there was no error in refusing an instruction relating to defects in the construction of the car.—*Thompson v. Metropolitan St. Ry. Co.*, 36 S.W. 625, 135 Mo. 217.

**Sup. 1904.** Where plaintiff's injury in an elevator was caused by a combination of a metal projection and the open side of the elevator cage, it was proper to refuse an instruction that the jury should not consider the fact that the elevator cage had no doors.—*Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 182 Mo. 597.

**Sup. 1904.** An instruction that a street railway company is bound to exercise the highest degree of care reasonably practicable for the personal safety of its passengers, and that such care should be used for the purpose of safely operating its cars and trains, in having its tracks and switch appliances kept in a reasonably good and safe condition, and for such purpose it was bound to exercise the highest degree of care reasonably practicable in inspecting and keeping its tracks, switch appliances, etc., in good and reasonably safe working order and position, was not misleading.—*Logan v. Metropolitan St. Ry. Co.*, 82 S.W. 126, 183 Mo. 582.

**Sup. 1907.** In an action against a street railway company for injury caused plaintiff in leaping from a street car after an electrical explosion on the front platform where she was riding, it was proper to modify the company's requested instruction that, if previous similar explosions were not of such violence as to actually endanger passengers riding on the front platform of the car upon

which such explosions may have occurred, it was not negligent to permit plaintiff to ride upon the platform, by adding, after the word "occurred," "and were not of such character as to excite and frighten" such passengers, "whereby they would be likely to jump off the car while in motion."—*Williamson v. St. Louis Transit Co.*, 100 S.W. 1072, 202 Mo. 345.

In an action against a street railway company for injury caused plaintiff in leaping from a street car on an electrical explosion in the controller box, it was proper to modify the company's requested instruction that if the company exercised proper care in the inspection of the electrical appliances, and no defect was discovered, and the accident could not have been reasonably foreseen or prevented, and if the company exercised all the care the law imposed upon it, and discharged its full duty to plaintiff, she could not recover, her injuries being attributed to a legal accident, by adding "unless \* \* \* defendant's agents \* \* \* were negligent in permitting plaintiff to occupy a seat \* \* \* in close proximity to said controller box"; the evidence showing that the company knew the danger incident to passenger's riding in such place.—*Id.*

**Sup. 1907.** In an action for injuries to a passenger, an instruction that there is no evidence that defendant failed to provide proper means to hold the grip of the cable train firmly attached to the cable, and to stop the same when not attached thereto, was properly refused, where there was slight evidence of the first element of negligence named.—*Roscoe v. Metropolitan St. Ry. Co.*, 101 S.W. 32, 202 Mo. 576.

**Sup. 1908.** In an action against a street railway company for injuries to a passenger, where the evidence disclosed that defendant's servants in charge of the car applied the brake and reversed the power in their efforts to stop it before reaching a railroad crossing, but were unable to do so, and in consequence it was struck by a railroad engine and derailed, it was proper to charge that if defendant was negligent in the management of the car, and negligently maintained the car, machinery, appliances, brakes, and running gear thereof, and that in consequence thereof he was injured, the jury should find for plaintiff.—*Beave v. St. Louis Transit Co.*, 111 S.W. 52, 212 Mo. 331.

**Sup. 1909.** In an action for injuries received by one who was caught between the car

and a railing extending parallel with the truck over a viaduct, the court instructed that, if the jury found that plaintiff was a passenger, defendant was bound to exercise the highest reasonable practicable degree of care of very prudent men engaged in the street railway business to carry and receive plaintiff in safety, and any failure on its part was negligence, and if the jury found that defendant negligently allowed the railing to remain dangerously close to the front of passing cars, and that defendant's servants controlling the car negligently failed to stop the car a reasonably sufficient time to permit plaintiff to get upon the car in safety, and that defendant's servants negligently started the car forward when they knew or should have known that plaintiff was getting on, and plaintiff was injured thereby, and if plaintiff was at all times exercising for his own safety, such care as a reasonably prudent man would exercise under the same circumstances, the verdict should be for plaintiff. *Held*, that while the jury might infer from the instruction that the same degree of care was required of defendant in the construction of its platform and railing as in receiving and carrying a passenger, yet, taken as a whole, it is not misleading.—*Joyce v. Metropolitan St. Ry. Co.*, 118 S.W. 21, 219 Mo. 344.

**Sup. 1909.** In an action for injuries received while plaintiff was a passenger on defendant's elevator, the court instructed that if, when plaintiff approached the elevator, the door was open; and plaintiff believed the elevator was in service and entered it, and the elevator started downward and there was no person operating the elevator; that if plaintiff attempted, on its starting down, to leave said elevator, and in attempting to do so was injured, and if the hydraulic machine operating the elevator was defective and was so known to defendant, or by ordinary care might have been so known, and the descent of said elevator was directly caused by the hydraulic machine being defective, and if plaintiff, after the elevator started to descend and by reason thereof, was seized with alarm for her safety and had reasonable cause to apprehend peril, and the appearance of danger was imminent, leaving no time to deliberate, then their verdict must be for plaintiff. It was undisputed that the elevator was an hydraulic elevator, and that the apparatus controlling the lever for starting and stopping the elevator had been removed or so fixed as to be ineffective, thereby permitting the elevator to ascend and descend without

hindrance according to the weight or load on the car and the counterweight or hydraulic pressure on other parts of the elevator, and that the operator had been operating the elevator for some time prior to the injury without such apparatus, *Held*, that there was evidence sufficient to justify the instruction.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

In an action for injuries while a passenger on an hydraulic elevator, there was evidence that the car and its counterweights and the hydraulic pressure were evenly balanced, and that to keep the car stationary, the operating lever had to be kept in constant motion back and forth; that the elevator was stationary when plaintiff and another person stepped into it; that there was no operator in the elevator and that immediately upon their stepping into it it began to descend. *Held*, that a requested instruction that there was no evidence that the lever of the elevator, on account of any jarring caused by plaintiff and her companion stepping into the elevator, was caused to move sufficiently to allow the elevator to descend, or that the lever moved at all on account of such jarring was properly refused.—*Id.*

In an action for injuries to plaintiff while a passenger on an elevator, there was evidence to show that it was an hydraulic elevator; that the elevator and the counterweights balanced; that the apparatus around the lever operating the elevator to hold and control it had been removed or rendered inoperative; that in order to stop the elevator and keep it at a standstill the lever must be constantly kept in motion. *Held*, that a requested instruction that there was no evidence that the descent of the elevator was due to any defect or defects in the machinery by which said elevator was controlled was properly refused.—*Id.*

**Sup. 1925.** Instruction that carrier would not be liable for icy condition of steps, if cleaned at certain station, properly refused.—*Taylor v. Missouri Pac. R. Co.*, 279 S.W. 115, 311 Mo. 604.

Instruction that carrier had no duty to clean and remove ice from steps between certain stations properly refused.—*Id.*

**App. 1879.** In an action by a passenger against a carrier for personal injuries, an instruction that defendant was bound to use the "most perfect" material, and to construct its appliances in the "most perfect manner, which care and diligence can suggest," is er-

roneous, as requiring a degree of diligence not required by the law; and such error is not cured by the qualifying words, "consistent with the business of building, repairing, and operating," its vehicles.—*Yerkas v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 265.

**App. 1894.** Where, in an action for personal injuries caused by plaintiff's dress catching on a projecting bolt on the platform of defendant's street car, instructions that plaintiff must have been in the exercise of reasonable care and diligence, that defendant must have been negligent and careless in operating the car with such projecting bolt, and that in the exercise of a very high degree of care might have known of such projecting bolt in time to have remedied it, and defining the degree of care required, are not subject to objection.—*Chartrand v. Southern Ry. Co.*, 57 Mo. App. 425.

**App. 1903.** In an action by a street car passenger for injuries sustained by the derailment of the car at a switch, the petition alleged that defendant's employes carelessly suffered the car to leave the track and collide with another car. There was evidence of the condition of the track and switch, with evidence that cars often left the track at that place. Defendant's testimony showed that such accidents could be prevented by locking the switch. *Held*, that an instruction authorizing the jury to find for plaintiff if defendant's employes in charge of its tracks and switches could have prevented the accident was within the issues presented by the evidence.—*Heyde v. St. Louis Transit Co.*, 77 S.W. 127, 102 Mo. App. 537.

**App. 1905.** In an action for injuries to a street car passenger, the court charged on plaintiff's behalf that, if on an explosion occurring in the car, followed by fire, plaintiff became so alarmed that she endeavored to escape and was injured in so doing, and the explosion and burning of the car were occasioned by any defect in the condition of the car or apparatus, or by any improper management thereof, and if such defect or improper management resulted from any negligence on defendant's part for failure to exercise the highest degree of care, skill and foresight, etc., the jury should find for plaintiff. The court, on defendant's behalf, charged that if prior to the accident defendant had employed competent inspectors to inspect the electrical appliances used on the cars, and that such inspector had used a very high degree of care in making reasonable in-

spections of the car on which plaintiff was injured a short time prior to her injury, and that such inspection failed to disclose any defect in the electrical appliances which were apparently in a reasonably safe condition and the accident in question could not have been reasonably anticipated by the exercise of a very high degree of care in inspecting the car, etc., plaintiff could not recover. *Held*, that such instructions were not contradictory.—*Brod v. St. Louis Transit Co.*, 91 S.W. 993, 115 Mo. App. 202.

**App. 1907.** In an action for injuries to a street car passenger by a defect in the floor of a car, an instruction that, if the car was inspected on the day it was sent out and was found in a safe condition with respect to a trap door forming a part of the floor through which plaintiff fell, then the allegation of defendant's negligence in maintaining the door was not sustained by the evidence, was properly refused as basing defendant's liability on the question of inspection, regardless of the character thereof.—*Jorden v. St. Louis & M. R. R. Co.*, 99 S.W. 492, 122 Mo. App. 330.

**App. 1908.** A request to charge that, if a carrier's car platform and steps became icy en route, which caused plaintiff to fall therefrom as he was about to alight, the jury would not be authorized to find that defendant's employes were negligent in not removing or attempting to remove the ice after the train arrived at plaintiff's station before permitting passengers to alight, was properly refused, as conditions might arise under which it would be the carrier's duty en route to remove ice from the steps of its cars for the safety of passengers.—*Ilaas v. St. Louis & S. F. R. Co.*, 106 S.W. 599, 128 Mo. App. 79.

A request to charge that carriers of passengers are not insurers, and are not required to keep up a continuous inspection of their appliances en route, and are not responsible for accidents resulting from agencies over which they have no control, such as storms en route, etc., and that, if the ice and snow accumulated on the car platform, which caused plaintiff to fall, en route, and was due to the weather prevailing, then the carrier was not negligent in failing to remove the ice and snow en route, or at destination before permitting passengers to alight, was properly refused, since, whether the carrier was bound to remove the snow and ice so accumulated, was dependent on the existing circumstances, and whether it was apparent to

a reasonably prudent person that passengers could not get on or off the cars in the exercise of reasonable care without danger of falling, unless the platform and steps were cleared.—*Id.*

**App. 1912.** An instruction authorizing recovery if the carrier failed to supply heat to keep the car reasonably warm for its passengers *held* not misleading.—*Roark v. Missouri Pac. Ry. Co.*, 147 S.W. 499, 163 Mo. App. 705.

**App. 1924.** In passenger's action for injury, instruction that plaintiff could not recover merely because the transom of one of defendant's cars broke, causing unusual movement of the car, and that it was the jury's duty to determine whether such breaking could have been foreseen or anticipated, and, if the defect which caused the break was a hidden one, then defendant was guilty of no negligence, was misleading and confusing, and its refusal was not error.—*Mulderig v. Wells*, 257 S.W. 1030.

In passenger's action for injury, an instruction that it was jury's duty to determine whether the breaking of a transom could have been foreseen or anticipated, and, if the defect which caused the break was a hidden one, or such as could not have been seen or found on examination, then defendant was guilty of no negligence in connection with the breaking of the transom, did not properly state the degree of care required of defendant, and its refusal was not error.—*Id.*

**App. 1926.** Instruction defining *vis major* *held* not erroneous, as requiring carrier to exercise highest practicable care and foresight to anticipate *vis major*.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) State ex rel. *St. Louis & S. F. R. Co. v. Daues*, 290 S.W. 425.

Instruction requiring carrier to keep its bridge in repair so as to secure, in so far as reasonably vigilant human foresight could do, safety of its passengers, *held* not erroneous, as requiring carrier to exercise larger measure of diligence than law requires.—*Id.*

**App. 1927.** In passenger's action against railroad for injuries from block thrown up by train, instruction that railroad was not required to guard against extraordinary occurrences *held* properly refused.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.



321 (9). Management of conveyances in general.

**Sup. 1903.** Where, in an action by a street car passenger for injuries for alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve, there was some evidence that the car of the other company stopped after entering the curve at a point where the danger was greatest, an instruction that such company was not liable, if at the moment of the accident its car was not passing through the curve, was properly refused, because authorizing a verdict for it if its car had stopped after entering the curve.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

**Sup. 1906.** In an action against a street railroad for injuries to a passenger, the petition alleged that the car in which plaintiff was riding was permitted to run upon a curve at an excessive and dangerous rate of speed and to strike the curve with sudden and unusual force, and there was evidence that the car did strike the curve with violence. The court instructed for plaintiff that, if the car struck the curve with violent and unusual force, etc., plaintiff was entitled to recover, and instructed for defendant that plaintiff was required to prove by the greater weight of evidence that her injuries were caused by the car entering the curve at a rapid and excessive speed, and by striking the curve with violent and unusual force. *Held* that the instruction given for plaintiff was not erroneous on the ground that it did not expressly require the jury to find that the car was being run at a "rapid, excessive, and dangerous rate of speed."—*Chadwick v. St. Louis Transit Co.*, 93 S.W. 798, 195 Mo. 517.

**Sup. 1918.** In action against street railway by girl passenger who jumped from car moving backward down incline, *held*, that court improperly refused defendant's requested instruction that, if some one other than employes on the car released brakes, plaintiff could not recover.—*Delfosse v. United Rys. Co. of St. Louis*, 201 S.W. 860.

**Sup. 1925.** Excessive speed, proximate cause of injuries, entitles plaintiff to recovery, in absence of contributory negligence.—*Unterlacher v. Wells*, 278 S.W. 79.

**App. 1901.** In an action against a railroad for injuries to a passenger, a charge to find for plaintiff, if defendant started a train of cars containing stock accompanied by plaintiff while it was yet dark along the southern

track of defendant's railroad, without a light or any person on the front to avoid collision, if such conduct was not that of an ordinarily prudent person under similar circumstances, as it simply enumerated the elements on which plaintiff was entitled to recover, was proper, and did not give undue prominence to any facts.—*Fleming v. Kansas City Suburban Belt R. Co.*, 89 Mo. App. 129.

**App. 1904.** In an action against a street railway company for injuries alleged to have been caused by negligence in leaving a gate on the rear platform, through which plaintiff fell, in a condition in which it was liable to open, and in which there was no allegation or proof that the gate broke, the use of the words "giving away," with reference to the gate, in the instructions, was not erroneous, as they did not refer to a fracture, but to disconnection from position as a barrier.—*Aston v. St. Louis Transit Co.*, 79 S.W. 990, 105 Mo. App. 226.

**App. 1908.** Where, in an action for injuries to a passenger, the only negligence referred to in the operation of the cars was that of suddenly starting the car that plaintiff was on, and of failure to stop the passing car, so as to avoid striking him, and the latter element was specifically withdrawn from the jury's consideration, an instruction authorizing a recovery unless the jury believed that defendant's servants in managing the cars were not guilty of "any negligence" in causing the injury was not objectionable as misleading the jury to charge defendant with some act of negligence other than that submitted.—*Spaulding v. Metropolitan St. Ry. Co.*, 107 S.W. 1049, 129 Mo. App. 607.

**App. 1909.** An instruction, assuming that the operation of a train around a curve "at an unusually high rate of speed" was negligent, is erroneous, as a speed may be safe, though unusual.—*Flucks v. St. Louis, I. M. & S. Ry. Co.*, 122 S.W. 348, 143 Mo. App. 17.

321 (10). Causing passenger to fall from train.

**Sup. 1904.** Where, in an action by a passenger for injuries sustained in a railway collision, the evidence showed that, because of the crowded condition of the car, the passenger was standing on the front platform, and that when the danger of a collision was imminent a panic ensued, and he was pushed off by people attempting to escape, and fell to the ground an instant before the collision, an instruction imposing on the carrier the duty of carrying the passenger safely as far as it was capable by human care to do, making it liable

for the slightest neglect, and stating that, where a collision results from two cars being run in opposite directions on a single track, the carrier is *prima facie* negligent, was not erroneous, because based on the theory that the passenger was injured by the collision of the cars.—*Magrane v. St. Louis & Suburban Ry. Co.*, 81 S.W. 1158, 183 Mo. 119.

**Sup. 1925.** Instruction that passenger could not recover if not thrown by jolt but by another passenger crowding him *held* misleading.—*Carlson v. Wells*, 276 S.W. 26, 42 A. L. R. 1319.

**App. 1903.** Plaintiff's evidence tended to show that he was standing on the steps of the rear platform of defendant's street car while it was crossing a railroad track, having intended to get off before the car started to cross, and that the conductor, who had gone ahead to see that no railroad cars were approaching, boarded the car at the rear platform, while it was in motion, and in so doing collided with plaintiff and interfered with his footing, throwing him to the ground. The court instructed the jury that they must not infer the conductor's negligence from the mere fact that he struck plaintiff as the latter was getting off or standing on the car. *Held* erroneous, as leaving out of view the fact that the conductor interfered with the plaintiff's footing on the steps in boarding the car.—*Fleming v. St. Louis & S. Ry. Co.*, 74 S. W. 382, 101 Mo. App. 217.

**App. 1905.** Where plaintiff was injured by being thrown from a street car by the sudden stopping thereof, and there was evidence that passengers sitting in seats were thrown over and upon other seats, a requested instruction that the simple fact that the car when stopped may have "jerked or slowed up some," having a tendency to cause persons not holding to the car to be thrown forward, would not authorize a recovery, even if plaintiff fell therefrom and was injured on account of such stopping of the car, was properly refused.—*Willis v. St. Joseph Ry., Light, Heat & Power Co.*, 86 S.W. 567, 111 Mo. App. 580.

Where, in an action for injuries to a passenger by being thrown from a street car by a sudden stop, there was no evidence that any of the passengers jumped from the cars, or were attempting to alight, prior to defendant's attempt to stop the cars, an instruction that if there was a fight or commotion on the cars at the time, and the passengers became excited and were jumping therefrom while the cars were in motion, and such passengers

cried out "Fire!" or "Fight!" or "Stop the Cars!" it was the duty of defendant's servants to stop the cars in the shortest time, having due regard to the rights and safety of passengers thereon, was properly refused.—*Id.*

**App. 1914.** In an action for personal injuries where there was evidence that plaintiff was thrown from the car by a sudden start, or was pushed off by other passengers, an instruction excluding defendant's liability for its negligence in suddenly starting the car *held* properly refused.—*Stoltze v. United Rys. Co. of St. Louis*, 166 S.W. 1102, 183 Mo. App. 304.

### ←321 (11). Sudden jerks, lurches, or jolts.

**Sup. 1891.** A boy 12 years old was thrown from a street car, and injured. He was standing on the step of the front platform, and testified that he was thrown from the car by a sudden jolt, after the driver had put his term in a rapid run. *Held*, that a charge that if the boy was injured, as charged in the petition, by the negligence of defendant, the verdict should be for the boy, but, if he was injured by his own carelessness in jumping from the car while in motion, the verdict should be for defendant, was misleading, and liable to divert the jury from the question whether it was negligence for the boy to stand on the platform.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 16 S.W. 500, 106 Mo. 535, judgment affirmed by court in banc, 17 S.W. 490, 106 Mo. 535.

**Sup. 1901.** Where, in an action for injuries received in a railway collision, the petition alleged that the plaintiff was thrown forward by the concussion, and had his leg crushed between the door of the car and the door jamb, and the evidence showed that the plaintiff was thrown forward and partially out of the car while standing in front of the side door thereof, and defendant requested an instruction that the jury should find in its favor unless they found that the plaintiff was thrown forward "from his seat" and injured, the striking out of the words "from his seat," was not error.—*Chitty v. St. Louis, I. M. & S. Ry. Co.*, 65 S.W. 959, 166 Mo. 435.

**Sup. 1904.** Where, in an action for injuries to a passenger on a street car, the cause of the injury was alleged to be the sudden, violent stopping of the car, and there was some evidence that after the accident a bolt or piece of iron of some kind was taken from the slot rail, it was proper not to restrict the jury to finding negligence as to the presence

of a bolt or piece of iron in the rail.—*Redmon v. Metropolitan St. Ry. Co.*, 84 S.W. 26, 185 Mo. 1, 105 Am. St. Rep. 558.

**Sup. 1909.** After the giving of an instruction that plaintiff could recover if the car stopped in response to his signal, and that it was then negligently started with a jerk, causing him to fall, it was error to give another instruction that plaintiff could recover though the car was not stopped, and that plaintiff was warned by the motorman not to get on and plaintiff was injured in attempting to board the car while running at full speed by being dragged an unnecessary distance, and this contributed to the cause of his injury; the two causes of injury being so inconsistent that they could not contribute with each other to produce the injury.—*Graefe v. St. Louis Transit Co.*, 123 S.W. 835, 224 Mo. 232.

**Sup. 1910.** Where plaintiff claims that his injuries were caused by a jerk of the car, and testifies as to the jerk and how he fell, etc., an instruction on negligence in jerking the car is properly given, though by plaintiff's own testimony there was nothing to show that the operatives of the car had breached their duty, and the doctrine of *res ipsa loquitur* did not apply, since the jury might infer breach of duty from the facts testified to by plaintiff.—*Setzler v. Metropolitan St. Ry. Co.*, 127 S.W. 1, 227 Mo. 454.

**Sup. 1927.** Instruction that street car company was not liable to passenger if jolt causing injury was necessarily incident to starting *held* erroneously misleading.—*Lalble v. Wells*, 296 S.W. 428, 317 Mo. 141.

**App. 1905.** Where there was evidence that the street car in which plaintiff was riding at the time she was injured was started with a jerk, that too much power was applied and that in such case there was more likelihood of an explosion such as occurred than when the power was properly applied, it was proper to direct the jury's attention to the management of the car and charge that if the explosion and fire were caused by the mismanagement of the motorman, plaintiff was entitled to recover.—*Brod v. St. Louis Transit Co.*, 91 S.W. 993, 115 Mo. App. 202.

**App. 1907.** In an action for injuries to plaintiff while alighting from a car, testimony that the train jerked in a violent, unusual, and extraordinary manner was sufficient to justify an instruction as to defendant's liability in such case, though there was other testimony flatly denying this, and en-

deavoring to show that the manner in which the engine and cars were coupled precluded the possibility of starting the train with a jerk.—*Bond v. Chicago, B. & Q. Ry. Co.*, 99 S. W. 30, 122 Mo. App. 207.

**App. 1913.** An instruction in an action against a street car company for personal injuries, which hypothesized facts constituting negligence in law, need not require a finding that the sudden starting of the car was negligence.—*Fields v. Metropolitan St. Ry. Co.*, 155 S.W. 845, 169 Mo. App. 624.

**App. 1915.** An instruction in an action for injuries to a street car passenger *held* defective for failure to submit issue whether the car men know that the passenger had arisen from her seat when a jerk was made.—*Schwabenfeldt v. Metropolitan St. Ry. Co.*, 176 S.W. 1098.

**App. 1915.** Instruction as to negligence, if it was dangerous to board car, *held* properly refused; it not hypothesizing knowledge of danger or that an ordinarily prudent person would have done what was done.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

Where recovery was sought on theory that jolt was unusual, refusal of instruction that there was no evidence that those making a coupling knew a person was boarding a car *held* not reversible error.—*Id.*

**App. 1916.** In action for injury to passenger from sudden jerking of mixed train, an instruction, requiring defendant to rebut plaintiff's *prima facie* case, to show that the sudden stop and jolting "was caused by an inevitable accident which could not be avoided, or from some cause which human precaution and foresight could not have averted," should be modified to require of defendant only the highest degree of care.—*Provanee v. Missouri Southern R. Co.*, 186 S.W. 955.

**App. 1917.** An instruction to find for plaintiff passenger if defendant railroad negligently jerked its train forward so as to throw plaintiff attempting to alight off car, etc., *held* erroneous, where train was a freight, and evidence was conflicting whether jerk was incident to attempt to stop or to going forward after stop was abandoned.—*Patterson v. Lusk*, 196 S.W. 65.

An instruction that, if plaintiff passenger was injured when alighting at station by jerk ordinarily incident to operation of freight train, to find for defendant, is erroneous, since it might excuse a jerk in starting train for-

ward after attempt to stop was prematurely abandoned.—*Id.*

**App. 1920.** Though the petition alleged that defendant negligently and carelessly caused and permitted its street car to be moved and jerked in a sudden, violent, and unusual manner causing plaintiff to be thrown down, an instruction submitting the question whether defendant "negligently" caused the car to be moved and jerked in a sudden and violent manner was not erroneous because of the omission of the word "unusual."—*Fletcher v. Kansas City Rys. Co.*, 221 S.W. 1070.

**App. 1920.** An instruction, requiring the jury to find if the defendant's servants in charge of the car caused or permitted the car to suddenly and violently start with a jerk with such force as to throw some one who was riding in the inside of the car against the glass entrance door, and that in so doing the said servants acted negligently and that the glass was thereby broken from the door, was equivalent to requiring the jury to find that there was unusual and extraordinary jerk.—*Laycock v. United Rys. Co. of St. Louis*, 227 S.W. 883, certified questions answered (Sup. 1921) 235 S.W. 91.

**App. 1928.** Requested instruction, as modified, to effect that, if skidding of bus, causing passenger's injuries, occurred without negligence, passenger cannot recover, *held* correct.—*Heidt v. People's Motorbus Co. of St. Louis*, 9 S.W.(2d) 650.

**App. 1928.** Instruction that, if intending passenger fell because of jerk incident to operating motorbus, verdict must be for bus company, *held* error because barring recovery for unusual jerk.—*Alzheimer v. People's Motorbus Co. of St. Louis*, 6 S.W.(2d) 976.

#### —321 (12). Collision or derailment.

**Sup. 1899.** In an action for the death of a passenger caused by the car in which he was riding colliding with an obstruction on the track, an instruction that the carrier is liable if its servants in charge of the car saw the obstruction in time to stop the car and avoid the danger, or could, by the exercise of the care required of them, have seen it in time to stop the car, followed by an instruction as to the degree of care required of a carrier, is not erroneous as requiring the carrier's servant to stop the car when he saw the obstruction, though too late to avoid the injury.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

**Sup. 1903.** Plaintiff was injured in a collision between an electric car on which he

was riding and a car on which the president of defendant company was riding. The court refused to instruct that if, shortly before the president's car reached a certain point its motorman asked the motorman on a passing south-bound car if the latter car was the last car out, and was answered that there was one more car, and defendant's president understood the answer to be that the car was the last one out, and, relying on said advice, gave orders for his car to proceed, and if the collision was due solely to the president's misunderstanding of such answer, and such misunderstanding was purely accidental, and did not constitute negligence, the verdict must be for defendant. *Held* properly refused, where the president himself testified that he knew there were nine cars on the road, and that only eight had passed.—*Hennessy v. St. Louis & S. Ry. Co.*, 73 S.W. 162, 173 Mo. 86.

The instruction was properly refused; it appearing that the president's car was not a regular car on that part of the road, and there being nothing in the record to show that the manager or any motorman knew it was coming out.—*Id.*

The instruction was properly refused where the collision occurred on ladies' day at certain races, when the cars were crowded, and all the cars were needed to handle the crowds.—*Id.*

The instruction was properly refused where the president testified that it was the duty of the manager of the road to regulate the running of the cars, and to notify motormen of the cars that were on the road.—*Id.*

**Sup. 1907.** In an action for injuries to a street car passenger, an instruction that if, before plaintiff reached her destination, the car left the track and struck a post, causing plaintiff to be thrown from her seat and sustain the injuries complained of, she was entitled to recover, unless defendant showed by a greater weight of evidence that it could not have prevented such derailment by the exercise of the highest degree of care employed by a very careful railroad under the same or similar circumstances in maintaining its tracks in the same condition, and in the management and control of cars, etc., was proper.—*O'Gara v. St. Louis Transit Co.*, 103 S.W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

**Sup. 1909.** In an action for injuries to a passenger in a collision between cable trains, a portion of an instruction, requested by de-

fendant, declared that if the jury believed from the evidence that the injuries sustained by plaintiff were merely the result of accident no matter how produced, other than by negligence of defendant's servants "in charge of the train," then plaintiff cannot recover, etc. *Held*, that there was no error in striking out the words quoted, as the proof not only covered acts of the servants in charge of the train, but other acts which might have caused the accident.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

**Sup. 1920.** In common parlance, the word "flag," when used as denoting a signal, does not necessarily mean the actual use of a flag, but by figure of speech the word is used in the secondary sense and signifies a signal given as with a flag, that is to say, as by a waving of the hand for the purpose of communicating information; and, in an action by a passenger for injuries received in a collision at a crossing of a street railway and a railroad, court did not err in submitting the question whether defendant's servants failed and neglected to "flag said crossing," it being the duty of the conductor to go forward to the crossing and ascertain whether or not his car could safely proceed and, if so, then to wave to the motorman to proceed.—*Bergfeld v. Kansas City Rys. Co.*, 227 S.W. 106, 285 Mo. 654.

**Sup. 1922.** In action against street railway for injuries to a passenger in a collision, an instruction that plaintiff was not required to prove the cause of the collision, but that the burden of proof was cast on defendant to rebut the presumption of negligence, "and that the injury, if any, to plaintiff was occasioned by inevitable accident that could not, by the exercise of the utmost human foresight, knowledge, skill, and care, have been prevented by the defendant," imposed on defendant a greater burden than that required by the law, as the highest degree of care practicable among prudent and skillful men is all that is required.—*Walquist v. Kansas City Rys. Co.*, 237 S.W. 493.

**Sup. 1924.** In passenger's action for injuries from collision of street cars, instruction failing to require the jury to find that defendant had notice of defective brake valves prior to the accident was not erroneous, though plaintiff unnecessarily proved notice, in view of presumption of negligence.—*Kinchlow v. Kansas City, K. V. & W. Ry. Co.*, 264 S.W. 416.

**Sup. 1927.** In passenger's action for injuries against railroad and brick company

whose employee opened switch, instruction to find for latter if engineer should have seen open switch in time to stop *held* not error.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**App. 1907.** In an action against a street railway for injuries received by plaintiff in a collision, an instruction that, if plaintiff received his injuries as the result of some occurrence which careful men in the situation of defendant's agent would not have reasonably anticipated, then such occurrence is what, in law, is termed an "accident," and defendant was not liable, was misleading; an accident being something unexpected and unavoidable.—*Hunt v. Metropolitan St. Ry. Co.*, 103 S.W. 1088, 126 Mo. App. 79.

**App. 1908.** An instruction, in an action against a carrier for injuries to a passenger by the derailment of the coach, that, if the injury was the result of an accident, the verdict should be for defendant, was properly refused for failing to state that the accident was inevitable or unavoidable.—*Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S.W. 1082, 130 Mo. App. 162.

**App. 1910.** Where the evidence in an action for injuries to a passenger in a collision with a metal tower near the track in a public square, showed that two cars were in the train, that one left the track near the public square, and the other at the tower, an instruction limiting the inquiry to the derailment of the car, but not saying which car, was properly refused as confusing and misleading, since the trailer car might have left the track without any defect in the track or fault on the part of defendant, and yet the subsequent conduct in not stopping the car before it reached the tower might make the defendants liable.—*Wolven v. Springfield Traction Co.*, 128 S.W. 512, 143 Mo. App. 643.

**App. 1920.** Where passenger on street car, suing for personal injuries, charged general negligence, but proved only specific acts, in that defendant's servants failed to ascertain if there was any train closely approaching the crossing, where the car was struck by a freight train, court did not err in charging the jury that, if defendant failed to use the highest degree of care in any particular plaintiff could recover.—*Bergfeld v. Dunham*, 228 S.W. 891.

In an action by a street car passenger to recover for injuries suffered in a collision between street car and freight train, where

street railway strenuously contended that plaintiff was injured through the negligence of the railroad company, and submitted numerous instructions to the jury on that theory, court did not err in charging that any negligence of the railroad company did not relieve the street railway of using that degree of care for plaintiff's safety set out in the other instructions given, and that if such negligence, if any, caused or directly contributed to cause injuries to plaintiff, the latter was entitled to recover.—*Id.*

**App. 1924.** In an action against a street car company for injuries to passenger from collision with a truck, an instruction sending the case to the jury without telling them what acts would constitute negligence, nor in what respect defendant was negligent, *held* not erroneous, since negligence was presumed under the *res ipsa loquitur* rule.—*Gibson v. Wells*, 258 S.W. 1.

**App. 1924.** In an action against a street railway company for injuries to a passenger in a collision between a street car and a motor truck, an instruction authorizing a verdict against defendant if the motorman negligently failed to exercise the highest degree of care and thereby directly contributed to cause the collision, *held* not error as authorizing a verdict for plaintiff on a general finding of negligence on any theory evolved by it without regard to the evidence; it being defendant's duty, under the *res ipsa loquitur* rule, to show that the collision did not occur through any negligence on its part.—*Cecil v. Wells*, 259 S.W. 844, 214 Mo. App. 193.

#### ⚡321 (13). Management of elevators.

**Sup. 1909.** In an action against the owners of an office building who ran passenger elevators for injury to a passenger on the elevator, the instructions given *held* to properly present the law of the case.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1921.** An instruction in general terms that if the jury found that defendant failed to exercise the highest practicable degree of care in the maintenance of his elevator, and as a direct result thereof cables broke and the elevator fell and plaintiff was injured thereby, verdict must be for the plaintiff, was not erroneous for not requiring finding on the specific acts of negligent conduct, as to which plaintiff had offered evidence.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**App. 1906.** Where an injury to a passenger of an elevator was alleged to have been

caused by the premature starting of the car before plaintiff had time to alight, an instruction that it was the operator's duty to stop the elevator at the floor in question a sufficient length of time to enable any passenger desiring to alight, "in the exercise of ordinary care to do so," was erroneous; the operator being only bound to hold the car a reasonable time for passengers to "alight or indicate their intention to do so."—*Becker v. Lincoln Real Estate & Building Co.*, 93 S.W. 291, 118 Mo. App. 74.

**App. 1912.** An instruction authorizing recovery whether plaintiff's child fell or walked from a passenger elevator *held* not error.—*Howard v. Scarritt Estate Co.*, 144 S.W. 185, 161 Mo. App. 552.

#### ⚡321 (14). Setting down passengers in general.

**Sup. 1885.** An instruction, in an action against a carrier for injuries to a passenger that defendant was bound to exercise the highest degree of care in carrying plaintiff from the place where he entered the train to the place of his destination, and to deposit him safely at the latter place, and that plaintiff had a right to rely upon the directions and actions of the servants in charge of the train as to when it arrived at the station, was not objectionable as imposing too great a degree of diligence on defendant, where the instruction also stated hypothetically the facts upon which the plaintiff might recover.—*Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50.

**Sup. 1903.** Where a street car company was entitled to an instruction that it was not guilty of negligence unless a car had "stopped" when a passenger attempted to alight, the use of the term "stopped still" was no abuse of the right.—*Peck v. St. Louis Transit Co.*, 77 S.W. 736, 178 Mo. 617.

**Sup. 1915.** An instruction that if the conductor, in addition to warning plaintiff not to step from the car before she alighted therefrom, "exercised reasonable care to prevent her from alighting therefrom," she could not recover, was not error.—*McHugh v. St. Louis Transit Co.*, 88 S.W. 853, 190 Mo. 85.

**Sup. 1915.** In an action by a passenger hurt in alighting, a charge that the fact of injury should not influence the verdict was improper.—*Walker v. Quincy, O. & K. C. R. Co.*, 178 S.W. 108.

**App. 1888.** In an action against a street railroad for injuries to an alighting pas-

senger, a charge ignoring the issue as to whether defendant's servants knew of plaintiff's desire to leave the car was erroneous.—*McDonald v. Kansas City Cable Ry. Co.*, 32 Mo. App. 70.

**App. 1909.** Where, in an action for injuries to street car passenger plaintiff did not allege that west side of street intersection was customary stopping place for discharge of east-bound passengers, instruction for defendant that if jury believed regular stopping place was on east side and, if injuries were caused by attempt to alight before such point was reached, while car was in motion, she could not recover, was error.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084. See Carriers, 348(7) in this Digest.

**App. 1912.** An instruction in an action for injuries to a street car passenger while alighting *held* not misleading.—*Brown v. Metropolitan St. Ry. Co.*, 143 S.W. 561, 161 Mo. App. 236.

**App. 1915.** In a passenger's action against a street railroad for personal injury while alighting, an instruction that defendant was liable for all injuries resulting from "slight" negligence *held* erroneous.—*Davis v. Metropolitan St. Ry. Co.*, 177 S.W. 1097.

321 (15). Starting or moving car while passenger is alighting.

**Sup. 1881.** In an action against a railroad for injuries sustained by plaintiff in alighting from a train, owing to the starting of the train, the court refused to instruct that, if the jury believed from the evidence that the train stopped long enough to enable plaintiff to get off safely, then they should find for defendant. *Held*, that such instruction was properly refused, since its phraseology was such as to exempt defendant from liability, although guilty of negligence proximately contributing to produce the injury after becoming aware of the concurring negligence of plaintiff.—*Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185.

**Sup. 1883.** Instructions in an action by a passenger for injuries caused by the starting of the train while she was alighting examined, and *held* to be objectionable, though perhaps not fatally defective.—*Clotworthy v. Hannibal & St. J. R. Co.*, 80 Mo. 220.

**Sup. 1884.** In an action for injuries to a passenger, alleged to have been caused by the negligence of the railroad company in starting the train before she had time to alight therefrom, an instruction that the

railroad company was bound to exercise the "strictest vigilance" in carrying such passenger to her destination was not erroneous, as requiring a higher degree of care and vigilance in reference to passengers that the law imposes.—*Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608.

**Sup. 1888.** In an action for injuries sustained in getting off a train, an instruction that, if the train did not stop long enough to allow plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was injured, then plaintiff can recover, is not defective, where, in another paragraph, the court told the jury that, under such a state of facts, the plaintiff could not recover if guilty of contributory negligence.—*Owens v. Kansas City, St. J. & C. B. R. Co.*, 8 S.W. 350, 95 Mo. 169, 6 Am. St. Rep. 39.

**Sup. 1890.** The court instructed the jury that plaintiff was entitled to a verdict if they should find *inter alia* that defendant's servants "did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety." *Held*, that this did not require a finding that there was a complete stop.—*Ridenhour v. Kansas City Cable Ry. Co.*, 14 S.W. 760, 102 Mo. 270, affirming judgment 13 S.W. 889, 102 Mo. 270.

There is no substantial difference in effect between the terms "ordinary care" and "reasonable care" as the latter was used in said instruction.—*Id.*

**Sup. 1893.** In an action by a passenger against a street-car company for injuries sustained by a sudden starting of the car while plaintiff was in the act of alighting, an instruction that "defendant owed to plaintiff the duty of exercising the utmost care and vigilance to permit her to alight in safety" was properly refused, as it states the degree of care required of defendant too broadly.—*Jackson v. Grand Ave. Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**Sup. 1900.** In an action against a street-railway company for injuries to plaintiff caused by suddenly starting a car on which he was a passenger after slowing it down to allow him to alight, indefiniteness in instructing that it was the duty of defendant's servants to exercise a high degree of care to so control its cars as to enable plaintiff to alight safely at his point of destination is cured by also instructing that, if plaintiff signified his desire to stop at a certain street,

and the usual place of stopping at such street, for a car going north was at the north crossing, then the gripman, in the exercise of a high degree of care, was not required to slow up or attempt to stop south of such north crossing, though plaintiff left his seat, and got down on the running board.—*Grace v. St. Louis R. Co.*, 56 S.W. 1121, 156 Mo. 295.

Where, in an action against a street-railway company for injuries caused plaintiff by suddenly starting a car on which he was a passenger after slowing it down to permit him to alight, the court instructs that it was the defendant's duty to so control its cars as to enable plaintiff to alight in safety at his point of destination, and the evidence shows the accident to have occurred before the destination was reached, it is proper to refuse a modifying instruction, asked by defendant, that it was not defendant's duty to begin stopping the car as soon as plaintiff signified his desire to get off, nor as soon as he got down on the running board.—*Id.*

**Sup. 1903.** An instruction that the negligence charged is that the conductor of defendant's car stopped it to permit plaintiff to alight, and while she was alighting suddenly started it, throwing her down and injuring her, is not objectionable as placing stress on the stopping of the car as part of the act of negligence.—*Peck v. St. Louis Transit Co.*, 77 S.W. 736, 178 Mo. 617.

**Sup. 1905.** In an action for injuries to a passenger in alighting from a car, an instruction that the only charge which plaintiff brings against defendant is that the car had come to a full stop for the purpose of letting plaintiff get off, and those in charge, being defendant's employes, negligently started the car with a sudden motion while plaintiff was in the act of getting off, and in determining defendant's liability the jury must not consider any other question of negligence, was not erroneously modified by striking out "for the purpose of letting plaintiff get off."—*McCaffery v. St. Louis & M. R. R. Co.*, 90 S.W. 816, 192 Mo. 144.

**App. 1888.** In an action by a passenger against a street railway company for negligence, *held*, under the circumstances, that it would have been proper for the court to give defendant's instruction on the subject of accident or misadventure.—*Blair v. Mound City Ry. Co.*, 31 Mo. App. 224.

**App. 1889.** In an action against a railroad company for personal injuries to a pas-

senger, alleged to have been caused by negligence of defendant's servants in instructing plaintiff to alight from the train at a certain point while the train was in motion, an instruction that if the jury should find that the conductor or brakeman directed or advised plaintiff to get off the train, and that such direction or advice was given at a time and in a manner calculated to make a man of ordinary reason believe that the conductor or brakeman meant that he should get off at the time and under the circumstances then existing, they should find for plaintiff, was erroneous, because preventing consideration by the jury of the question whether the defendant's agent was guilty of a want of reasonable care and whether the plaintiff was in the exercise of reasonable care.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 36 Mo. App. 203.

In an action against a railroad company for personal injuries caused by the negligence of one of defendant's servants in directing plaintiff to alight from the train at a certain place, an instruction that if the jury found that plaintiff told the conductor that he wanted to get off the train at a certain place, and the conductor said all right, after which plaintiff fell asleep and was awakened by the conductor or brakeman at the point at which he desired to get off and hurried to the platform, on reaching which, and seeing that it was dark and that the train was moving, he stated that he was afraid to get off, whereupon the conductor or brakeman replied that he would not get hurt, but to hurry up and get off, and that in obedience to this direction he undertook to jump from the train, and in doing so received injuries, he was entitled to recover, was erroneous, because withdrawing from the jury the question of whether defendant's servant was guilty of negligence, and, if so, whether it was the proximate cause of the damage.—*Id.*

**App. 1899.** In an action against a railway company for failing to stop its train at a station to enable a passenger to alight, an instruction that, if plaintiff purchased a ticket entitling her to passage on the train from a designated station to another station, then it became the company's duty to safely carry her from the former to the latter station, and "to discharge her safely at the platform," or at "some other reasonably safe place," at such latter station, is misleading; the quoted words leading the jury to think that it was the company's duty to assist the passenger in leaving the train.—*Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152.



**App. 1900.** In an action by a passenger against the carrier to recover for injuries received by starting the train as a passenger was getting off, an instruction that plaintiff could not recover if the train started while she was in the act of getting off, unless defendant's servants knew she was in the act of getting off, was properly amended by adding, "or by the exercise of reasonable care could have known," where the evidence showed that the conductor was not on the car when he gave the signal to move, but was up near the head of the train, and could not see who was getting off the car on which plaintiff was, and depended on the porter of such car for information, and the porter gave no signal.—*Cullar v. Missouri, K. & T. Ry. Co.*, 84 Mo. App. 340.

**App. 1904.** The bracketed words in an instruction: "If the jury find \* \* \* that the car was slowed down while passing around the curve \* \* \* for the purpose of making it safe in getting around said curve, and that such slowing down was not done for the purpose of enabling plaintiff to get on the car, [then such slowing down of the car was not an invitation to plaintiff to attempt to get on the same]; and if the motorman did not know, and had no reasonable cause to think, that plaintiff was attempting to get on said car while it was in motion, then it was not negligent or improper in the motorman to accelerate the motion of said car when leaving said curve"—add no strength to the instruction, so that the omission thereof was harmless; the defense to which the instruction was applicable being that the motorman did not see plaintiff or know of his presence.—*Elkenberry v. St. Louis Transit Co.*, 80 S.W. 360, 103 Mo. App. 442.

**App. 1905.** In an action against a street railway company for injuries alleged to have been caused by the sudden starting of the car as plaintiff was dismounting therefrom, an instruction predicating plaintiff's right to recover upon proof that, while the car was standing, plaintiff took a position upon the back platform for the purpose of stepping off, and that, while in that position and before she had sufficient time to get off, the defendant's servants suddenly caused the car to be started, did not, when considered with another instruction forbidding a recovery if plaintiff stepped from the car after it started, authorize a finding for plaintiff, notwithstanding the jury might believe that she did not attempt to step from the car until after it had started.—*Nelson v. Metropolitan St. Ry. Co.*, 88 S.W. 1119, 113 Mo. App. 702.

**App. 1906.** Where, in an action for injuries to a passenger owing to the starting of a street car while she was alighting, the conductor testified that he saw her alighting at a point where the usage was to let off passengers, an instruction as to the facts authorizing a recovery was not erroneous for not requiring a finding that the operatives of the car knew of plaintiff's attempt to alight.—*Parks v. St. Louis Transit Co.*, 96 S.W. 426, 119 Mo. App. 445.

**App. 1907.** In an action for injuries to a passenger, where the evidence showed that the only warning to the passenger was given almost simultaneously with the starting of the car, so that, under the circumstances detailed by the witnesses for either party, it would not affect the carrier's liability, there was no error in an instruction in failing to require a finding that the car was started without any warning being given to plaintiff.—*Green v. Metropolitan St. Ry. Co.*, 99 S.W. 28, 122 Mo. App. 647.

**App. 1908.** In an action for injuries to a street car passenger by the alleged premature starting of the car, the jury were properly charged that, in order to find for plaintiff, they must find that she was a passenger, that the car stopped to allow passengers to alight, and that while she was alighting defendant's agents in charge of the car started it forward, without giving her warning or reasonable time to alight therefrom, and that by reason thereof plaintiff, while acting with proper care, was thrown down and injured.—*Black v. Metropolitan St. Ry. Co.*, 109 S.W. 86, 130 Mo. App. 548.

**App. 1908.** Where, in an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car, the evidence showed that, on the approach of the car to a street crossing, plaintiff rang the bell, preparing to alight; that the car stopped before it reached its usual stopping place; that plaintiff attempted to alight; and that the car suddenly started—an instruction that if the car, while plaintiff was in the act of stepping down was suddenly moved, and by reason thereof plaintiff was injured, the verdict should be for plaintiff, was sufficient.—*Hufford v. Metropolitan St. Ry. Co.*, 109 S.W. 1062, 130 Mo. App. 638.

**App. 1908.** In an action against a carrier for injuries to a passenger in alighting from a car, the court instructed that it was the duty of defendant to exercise towards plaintiff, if a passenger, the highest reason-

ably practical degree of care and foresight to carry plaintiff and allow her to safely alight from the car, and that if defendant failed to exercise such degree of care by starting up its car while plaintiff was in the act of alighting therefrom, and before she had reasonable time to alight therefrom, and plaintiff was thrown from said car to the ground and injured without any fault on her part contributing thereto, that the verdict must be for the plaintiff. *Held*, that this instruction was not defective as ignoring the question whether defendant's servants saw, or by proper care should have seen, plaintiff in the act of alighting when the car was started; all of defendant's evidence being to the effect that the conductor did observe plaintiff while she was alighting, and as the accident occurred at a regular stopping place, and it was the duty of the conductor before giving the signal to start to know whether the passenger was alighting.—*Alten v. Metropolitan St. Ry. Co.*, 113 S.W. 691, 133 Mo. App. 425.

**App. 1900.** An instruction, in an action against a carrier for injuries received while alighting from a car, that, if defendant's servants stopped the car to let plaintiff alight, it was defendant's duty to hold the car a reasonable length of time to permit her to alight, and that if, on the car stopping, plaintiff immediately started to alight and acted with reasonable care and diligence, and defendant suddenly caused the car to start, thereby inflicting the injury, plaintiff should recover, is not erroneous for failure to submit the question whether the car was stopped a reasonable time and as ignoring the question of knowledge on the part of defendant that plaintiff was alighting.—*Jones v. Springfield Traction Co.*, 118 S.W. 675, 137 Mo. App. 408.

**App. 1900.** Where the gist of a passenger's case was that the street car was halted to let her alight in obedience to her signal, and was negligently started while she was doing so, she was entitled to have the jury pass on the weight of the evidence supporting such case, though she was in error as to her claim that the car always stopped at the west side of the street intersection.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084, 142 Mo. App. 718.

An instruction omitting to require the jury to find that the crew in charge of the car from which plaintiff attempted to alight when injured by an alleged premature start knew or by ordinary care could or should

have known before starting the car that she was attempting to alight was properly refused.—*Id.*

**App. 1910.** Where the evidence showed that a conductor standing on the back platform of a street car announced a certain street, and on the car stopping plaintiff, a passenger, walked through the car and onto the back platform and attempted to alight, an instruction submitting the hypothesis that the conductor in the exercise of reasonable care could have known that plaintiff was leaving the car, instead of the hypothesis that the conductor actually knew that fact, was not error.—*McNally v. Metropolitan St. Ry. Co.*, 129 S.W. 464, 145 Mo. App. 127.

**App. 1910.** In an action for injuries to a passenger by an alleged premature start, a requested charge that if the train started while plaintiff was on the steps of the car in the act of alighting, and that in starting it moved slowly and not with a sudden and unusual jerk, and she was caused to fall by reason of the slow starting of the train only, she could not recover, was properly refused, as it was defendant's duty to hold the train a reasonable time to permit plaintiff to alight before it started.—*Kirby v. St. Louis & S. F. R. Co.*, 130 S.W. 69, 146 Mo. App. 304.

**App. 1911.** In an action by a passenger against a street car company for negligently starting a street car, where the allegations in the petition were that it came to a stop before she attempted to alight, and where there was evidence that the car was moving, it was not error to modify plaintiff's instruction that the jury were authorized to find for her if they believed her fall was caused by the sudden starting of the car while she was alighting, and the car either stopped at that point or was moving slowly, by striking out the words "or moving slowly," the expression being too indefinite, and admitting of a speed great enough to have been a factor in her fall.—*Kinyoun v. Metropolitan St. Ry. Co.*, 134 S.W. 15, 153 Mo. App. 477.

**App. 1911.** In an action for causing the death of a passenger by the sudden starting of a street car as he was attempting to alight, an instruction merely defining the care required of a carrier without applying it to the operation of the car in question is not erroneous as going beyond the specific charge of negligence and authorizing a recovery for any negligence of defendant.—*Norris v. Met-*

ropolitan St. Ry. Co., 137 S.W. 77, 156 Mo. App. 201.

**App. 1915.** In a passenger's action, the real issue *held* to be the negligent starting of the train after allowing the passenger insufficient time to alight; hence an instruction eliminating that issue was properly refused.—*Thomure v. St. Louis & S. F. R. Co.*, 177 S.W. 708, 191 Mo. App. 640.

**App. 1915.** In a passenger's action against a street railroad for personal injury, an instruction for plaintiff *held* not objectionable as requiring the jury to find that defendant's servants knew she had not gotten off the car when it started.—*Davis v. Metropolitan St. Ry. Co.*, 177 S.W. 1097.

**App. 1915.** In action by passenger for injuries while alighting at regular stopping place, received through starting of street car, an instruction omitting element of conductor's knowledge of plaintiff's alighting or ascertainment thereof by reasonable care *held* good.—*Paul v. Metropolitan St. Ry. Co.*, 179 S.W. 787.

**App. 1915.** In a passenger's action for injury, *held*, that an instruction was not objectionable because not requiring a finding that defendant's conductor knew that plaintiff was alighting, when such fact was conceded by the evidence.—*Clark v. Dunham*, 179 S.W. 795.

In an action for injury while alighting from street car, where the facts hypothesized in an instruction constituted negligence in law, it was not necessary for recovery to require a finding that conductor's act in suddenly starting car, with knowledge of plaintiff's position, was negligence.—*Id.*

**App. 1918.** In a passenger's action for injuries while alighting, an instruction directing a verdict for defendant if the car had been stopped a reasonable time for plaintiff to alight and the conductor did not see her starting to leave the car, was erroneous as failing to require the conductor to have looked to see if she was safely off before starting the car.—*Rogers v. Kansas City Rys. Co.*, 204 S.W. 595.

**App. 1920.** In action against a street railroad for injuries to alighting passenger, instruction that it was railroad employé's duty to use a high degree of care in order that passenger might safely alight if the car stopped, and if car employé's knew that passenger desired to get off, and that she

had started to alight from car, *held* sufficient, notwithstanding omission to hypothesize whether the car stopped to let the passenger off.—*Morris v. Kansas City Rys. Co.*, 223 S.W. 784.

**App. 1920.** In an action by a passenger against a street railway for damages for personal injuries, received when car, stopped or about to stop to permit plaintiff to alight, gave a violent jerk and threw plaintiff to the ground, an instruction *held* not open to complaint that it tended to confuse and mislead the jury because it referred to the fact that conductor opened the vestibule door, since it did not base a right to recover on this incident, but merely required the jury to find it as one of the many circumstances that would entitle plaintiff to recover.—*Roach v. Kansas City Rys. Co.*, 228 S.W. 520.

In an action by a passenger against a street railway to recover for personal injuries received when plaintiff, as he was about to alight, was thrown to the ground by a violent jerk of the car, an instruction was not erroneous in requiring defendant to exercise the highest practical degree of care to ascertain whether plaintiff was attempting to alight when the car slowed down or came to a stop.—*Id.*

**App. 1921.** Where a street car passenger had given notice of her intention to alight, and the car had stopped at a regular stopping place to permit her to do so, the conductor was bound to ascertain whether she had alighted before giving the signal for the car to start, so that an instruction which did not require a finding that the conductor knew she was attempting to alight as a prerequisite to recovery, was not erroneous, though such a finding would be necessary to sustain recovery if the passenger were attempting to alight at a place other than a regular stopping place.—*McMahon v. Kansas City Rys. Co.*, 233 S.W. 64.

**App. 1922.** Where the issue under the pleadings and evidence was whether plaintiff was thrown from a street car by a sudden jerk or voluntarily stepped off the car, an instruction for defendant, if plaintiff voluntarily stepped off the car while in motion, was erroneously modified by adding "unless \* \* \* it was moving so slowly that it was safe for him to alight."—*Leonard v. United Rys. Co. of St. Louis*, 239 S.W. 892.

**App. 1925.** In action against street railway company for injuries to passenger while

alighting, from sudden starting of car, instruction to find for plaintiff if she was thrown and injured from suddenly, violently, and forcibly starting car before she had reasonable opportunity to alight, *held* within issues formulated by pleadings and warranted by evidence.—*Higbee v. Fleming*, 269 S.W. 673.

In action for injuries from premature starting of car while plaintiff was attempting to alight from it, instruction *held* not erroneous for failure to submit issue of defendant's knowledge of plaintiff's perilous position, or of failure to notify plaintiff that car was about to be started; such matter being not in issue.—*Id.*

**App. 1925.** Instruction that negligent moving of car causing passenger to fall and be injured was sufficient for recovery *held* proper.—*Lay v. Wells*, 274 S.W. 933.

⇨ 321 (16). **Providing safe place or means for alighting.**

**Sup. 1938.** In a passenger's action for injuries sustained by falling into a hole on alighting from the train, the court instructed that the company must exercise that high degree of care that a very cautious person would exercise, including the providing safe means of egress at destination, and its failure to do so would be negligence; and, if defendant stopped its train at plaintiff's destination, and plaintiff, in the exercise of ordinary care, was injured by stepping into a hole on alighting, and if defendant was negligent in permitting such hole, and in stopping its train and inviting plaintiff to alight there, and her injuries were sustained as the direct result of such conduct, plaintiff could recover. *Held*, that the gist of the instruction was as to the company's negligence in stopping its train at an unsafe place and inviting plaintiff to alight there, and it was not limited to the condition of the station grounds, and the degree of care required, with respect thereto, when the relation of passenger did not exist.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

In a passenger's action for injuries sustained by stepping into a hole on alighting from a train, an instruction that it was not the train crew's duty to assist plaintiff in alighting, unless she requested assistance, was as favorable to the company as was necessary.—*Id.*

**Sup. 1920.** In an action for injuries to a passenger resulting after being carried past her station, an instruction to find for plain-

tiff only if conductor could have reasonably anticipated the possibility of such accident as befell plaintiff was erroneous, as being equivalent to charge that only ordinary care was required.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**App. 1923.** In passenger's action for injuries from falling as she stepped, on alighting from train, on foot box which turned over, where petition charged negligence in carelessly placing the box, and in that the box was "insecure and defective," an instruction to find for plaintiff if the box was placed by defendant's servants in an unsafe and dangerous position, or they "negligently permitted the same to become and be in an unsafe and dangerous position," *held* erroneous as broadening the issues.—*Green v. Chicago, B. & Q. R. Co.*, 251 S.W. 931, 213 Mo. App. 583.

⇨ 321 (17). **Care as to persons accompanying passengers.**

**App. 1903.** Where plaintiff was injured in getting off a car which had started while he was assisting his daughter to a seat, a refusal to instruct the jury that there was nothing in the conversation testified to between himself and his daughter to give notice to defendant's brakeman that he intended to get off after seating his daughter is proper where such instruction did not include the remarks of the brakeman tending to show that he understood that plaintiff was not to go on the train.—*Saxton v. Missouri Pac. Ry. Co.*, 72 S.W. 717, 98 Mo. App. 494.

**App. 1907.** An instruction as to the liability of a carrier if its servants in charge of the train failed to hold it stationary long enough for plaintiff to assist his daughter into the train, but jerked it in a violent, unusual, and extraordinary manner while he was about to alight therefrom and plaintiff was thereby injured, was not defective in omitting to require a finding that the train was negligently jerked, since the facts hypothesized constituted negligence.—*Bond v. Chicago, B. & Q. Ry. Co.*, 99 S.W. 30, 122 Mo. App. 207.

⇨ 321 (18). **Liability to persons accompanying stock.**

**Sup. 1903.** An instruction relative to the liability of a railroad company for injuries to one accompanying live stock on a train *held* not so vague and self-contradictory in its terms as to be obscure.—*Bolton v. Missouri Pac. Ry. Co.*, 72 S.W. 530, 172 Mo. 92.

**App. 1909.** Plaintiff's contract for the transportation of horses permitted him to ac-

company them and required him to look after and feed them. While the car was in the yards and about to be switched, plaintiff entered it to feed the horses, and a switch engine struck the car, throwing the horses down on plaintiff. *Held*, that it was error to refuse an instruction that if defendant's servants did not know that plaintiff had entered the car when it was about to be switched, and that if the engineer exercised such care as an ordinarily prudent engineer in charge of an engine would exercise in the same circumstances, the verdict must be for defendant.—*Bruce v. Chicago, B. & Q. Ry. Co.*, 116 S.W. 447, 136 Mo. App. 204.

321 (19). Proximate cause of injury.

**Sup. 1901.** Where plaintiff, suing a streetcar company for injuries received as a passenger, limits himself to a right to recover for the negligence of defendant, which defendant denies, contending that the injury was caused by unavoidable casualty, a charge that, though plaintiff was hurt without his fault, yet defendant was not liable, unless the jury find that the car went down the incline by reason of defendant's negligence, and if, by reason of any unavoidable casualty, it got beyond the control of defendant's gripman, then there was no negligence, properly stated the law applicable.—*Feary v. Metropolitan St. Ry. Co.*, 62 S.W. 452, 162 Mo. 75.

**Sup. 1909.** In an action for injuries to plaintiff while she was a passenger on an elevator, the evidence showed that there was no operator on the elevator; that the door was open and plaintiff and a companion stepped into the elevator, not knowing of the absence of the operator; that the elevator began immediately to descend; that plaintiff was alarmed for her safety and attempted to get out of the elevator and was injured. *Held*, that the court properly refused to instruct the jury that there was no evidence to show that the injuries complained of by plaintiff were caused by the descent of the elevator.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1922.** In a taxicab passenger's action for injuries against the taxicab company and one whose automobile collided with the taxicab, instructions authorizing a verdict against each defendant if such defendant violated a speed ordinance, and as a direct result thereof the taxicab and automobile collided, and plaintiff was injured, did not authorize a recovery unless the violation of the ordinance was the cause of the injury.—

*Varley v. Columbia Taxicab Co.*, 240 S.W. 218.

**Sup. 1925.** Instructions as to proximate cause of injury *held* misleading and prejudicial.—*Unterlachner v. Wells*, 278 S.W. 79.

**Sup. 1928.** In action against railroad company for injuries sustained while alighting from train, instruction permitting finding that porter's opening vestibule door constituted causal negligence *held* faulty; acts being incidental.—*Lewis v. Illinois Cent. R. Co.*, 3 S.W.(2d) 371, 319 Mo. 233.

**Sup. 1928.** Instruction for street railway if passenger's death was caused solely by disease *held* not objectionable as preventing recovery for death from nephritis aggravated by injury.—*Kirkpatrick v. Wells*, 6 S.W.(2d) 591, 319 Mo. 1040.

**App. 1926.** Instruction *held* to require jury to find that carrier's negligence was a proximate, contributing cause of fall of bridge.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) State ex rel. St. Louis & S. F. R. Co. v. Daues, 290 S.W. 425.

321 (20). Companies or persons liable for injuries.

See explanation, page iii.

321 (21). Presumptions and burden of proof.

**Sup. 1890.** In an action against a railroad company to recover for damages caused by the derailment of a car, an instruction that, after plaintiff proved the injury and the derailment of the car, the burden of proof shifted to defendant, although not as accurate as the statement that the facts of the derailment of the car and of plaintiff's injury thereby make out a prima facie case of defendant's negligence, will not be condemned, in view of the fact that Rev. St. 1879, § 3586, provides that the court shall in all proceedings regard substance rather than form, and the requirement in Rev. St. 1879, § 3659, that the court shall not reverse for any error not affecting the substantial rights of the adverse party.—*Furnish v. Missouri Pac. Ry. Co.*, 13 S.W. 1044, 102 Mo. 438, 22 Am. St. Rep. 781.

**Sup. 1894.** The court charged that negligence could not be presumed, but must be proved; that, though plaintiff was injured in getting on or off defendant's car, such fact alone does not entitle plaintiff to recover, but she must prove that she was injured in direct

consequence of the negligence of defendant's employes. *Held*, that the jury were not told that negligence could not be inferred from circumstances.—*Olfermann v. Union Depot R. Co.*, 28 S.W. 742, 125 Mo. 408, 46 Am. St. Rep. 483.

**Sup. 1901.** An instruction for defendant in a personal injury case that if the jury find, from all the evidence in the case, whether offered by plaintiff or defendant, that there was no negligence of the character submitted, then defendant's burden has been sustained, and it is entitled to a verdict, though they should find that plaintiff was a passenger, and was injured without fault on his part, does not conflict with an instruction for plaintiff that the burden was on him to show that the accident was caused by defendant's negligence, and, if he so showed, then the burden shifted to defendant to excuse itself; the first instruction simply telling the jury the means defendant might employ to excuse itself, and directing what evidence they might consider in determining whether defendant was without fault.—*Feary v. Metropolitan St. Ry. Co.*, 62 S.W. 452, 162 Mo. 75.

**Sup. 1904.** In an action for injuries to a passenger alighting from a street car, a charge that the burden of proof was on plaintiff to show that the car had stopped or slowed down, and that, while plaintiff was alighting, and before she had a reasonable time to alight, defendant's servants caused the car to move forward with increased motion, and thereby plaintiff was thrown on the street and injured, whereas, if defendant's servants had exercised a high degree of care, they would have prevented such injury, was not open to the objection of throwing on plaintiff the burden of proving that the sudden starting of the car could have been prevented by the exercise of the high degree of care incumbent on defendant.—*Rengan v. St. Louis Transit Co.*, 79 S.W. 435, 180 Mo. 117.

**Sup. 1904.** In an action for injuries to a passenger by a derailment of the car, caused by a defective switch, the fact that the cause of the accident was shown did not preclude the court from instructing the jury that proof of the derailment and of plaintiff's injury was sufficient to create a presumption of negligence on the part of the carrier.—*Logan v. Metropolitan St. Ry. Co.*, 82 S.W. 126, 183 Mo. 582.

**Sup. 1909.** In an action for injuries to a passenger in a collision between cable trains, in which defendant was charged with gener-

al negligence, and in which it appeared that all the instrumentalities connected with the collision were absolutely under defendant's control, and there was no evidence of an intervening cause, the court, after first declaring the rule as to the degree of care which defendant was obliged to use in such cases, and its responsibility for failure to use such care, stated that, if there was a collision between defendant's two trains on one of which plaintiff was a passenger, the presumption was that it was due to some negligence of defendant, and the burden of proof was cast on it to rebut such presumption and show "that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided." *Held*, that the instruction was not subject to objection on the ground that it too broadly stated the rule of law sought to be invoked, cast the burden on defendant, and was misleading.—*Price v. Metropolitan St. Ry. Co.*, 119 S.W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

In an action for injuries to a passenger in a collision in a case wherein the doctrine of *res ipsa loquitur* was applicable, the court properly refused an instruction placing on plaintiff the burden of proof, throughout the entire trial, as to the negligence of defendant's servants, and requiring plaintiff to prove by a preponderance of the evidence that defendant's servants were guilty as specified in the instruction, and that such negligence was the direct and proximate cause of the injury.—*Id.*

**Sup. 1909.** In a suit for injuries to a passenger by the sudden and violent stopping of a street car, a charge that if the car was permitted to come to an unusually abrupt, violent, and unexpected stop, and plaintiff was injured thereby, it would be presumed, in the absence of evidence to the contrary, that the stop was caused or permitted through defendant's negligence, and that it then devolved on defendant to show by a fair preponderance of evidence that the stop was not caused or permitted through its negligence, was proper.—*Briscoe v. Metropolitan St. Ry. Co.*, 120 S.W. 1162, 222 Mo. 104.

**Sup. 1912.** Instruction that motorman of street car might assume that a 15-ton steam-roller which was crossing the tracks very slowly would stay off or get off before the car reached it was properly denied.—*Stauffer v. Metropolitan St. Ry. Co.*, 147 S.W. 1032, 243 Mo. 305.

**Sup. 1913.** Where the petition in an action by a passenger for injuries from a derailment, merely alleged negligence generally and injury, an instruction that the burden was on plaintiff to show that the injury resulted from a derailment due to some defect in the track or want of care was erroneous, as requiring plaintiff to show specific acts of negligence.—*Hurek v. Missouri Pac. Ry. Co.*, 158 S.W. 581, 252 Mo. 39.

**Sup. 1921.** In passenger's action against street railway for injuries, passenger's instruction, purporting to cover the whole case, *held* not objectionable for failure to include hypothesis that the railroad had rebutted the presumption of negligence, where no reference was made to a presumption, and the instruction required the jury to believe from the evidence that the railroad was not guilty of negligence.—*Scott v. Kansas City Rys. Co.*, 229 S.W. 178.

**Sup. 1925.** Instruction that defendant's negligence could not be presumed *held* prejudicial, where doctrine of *res ipsa loquitur* was applicable.—*Carlson v. Wells*, 276 S.W. 26, 42 A. L. R. 1319.

**Sup. 1925.** Instruction on burden of proof *held* error under general allegations of negligence.—*Porter v. St. Joseph Ry., Light, Heat & Power Co.*, 277 S.W. 913, 311 Mo. 66.

**Sup. 1928.** Instruction requiring plaintiff to prove fall from elevator was caused by defendant's negligence was properly refused in case based on doctrine of *res ipsa loquitur*.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**Sup. 1928.** Instruction that railroad is presumed negligent in wreck of train and injury to passenger *held* not erroneous (Rev. St. 1919, § 4217).—*Schulz v. St. Louis-San Francisco Ry. Co.*, 4 S.W.(2d) 762, 319 Mo. 8.

**Sup. 1929.** Allegation of negligence in starting street car precluded objection to instruction on burden of proof as inapplicable to *res ipsa loquitur* doctrine.—*Lammert v. Wells*, 13 S.W.(2d) 547.

**App. 1879.** Where, in an action by a passenger against a carrier for personal injuries, plaintiff's own evidence showed that the accident was caused by a rainstorm of extraordinary violence, an instruction that the burden of proving that the injury complained of was caused by an act of God, such as a sudden or extraordinary rainstorm rests solely

on defendant, was erroneous.—*Gillespie v. St. Louis, K. C. & N. Ry. Co.*, 6 Mo. App. 554.

**App. 1879.** In an action by a passenger against a carrier for injuries, a clause in an instruction that "it is not necessary for plaintiff to prove actual want of care, or negligence, on the part of defendant," would have been more accurately expressed by the words "it was not necessary for the plaintiff to show negligence in the defendant by direct proof of the fact," but the faultiness in expression was harmless, where the jury could have easily inferred from other parts of the instructions that defendant could avoid liability by showing that it had used every possible care and diligence to avoid the injury.—*Yerkes v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 265.

**App. 1892.** In an action against a street railway company for injuries sustained by a passenger, it was proper for the court to refuse to instruct that it was the duty of the conductor to report all accidents, and that, if the accident to plaintiff was never reported, the presumption would be that the operatives of the car knew nothing about it; the only evidence tending to show that the report was not filed being that of the assistant manager, who merely testified that he never heard of it.—*Bigelow v. Metropolitan St. Ry. Co.*, 48 Mo. App. 367.

**App. 1905.** In an action for injuries to passenger it was not error for the court to strike the words "and no other cause" from an instruction that the burden was on plaintiff to establish that his alleged injuries were the direct and natural result of the assault by defendant's conductor, and of no other cause, etc.—*Flynn v. St. Louis Transit Co.*, 87 S.W. 560, 113 Mo. App. 185.

**App. 1907.** An instruction, in an action for injury to a passenger on an electric street car, on the ground of an explosion, causing panic among the passengers, that, if an explosion occurred in the machinery of the car causing a panic among the passengers, and plaintiff without fault received the alleged injury, then defendant had the burden of proving that the machinery was safe and sound, and that the explosion was caused by inevitable accident, or defects that could not have been known by the exercise of the highest human skill, diligence, and foresight, is erroneous, as making the explosion *prima facie* evidence of negligence under the doctrine of *res ipsa loquitur*, notwithstanding there was evidence to show that the explosion was not

a dangerous one, but due to the combustion of fuses, such as often happens on electric cars when well constructed and operated, and not sufficient to excite a panic among persons of average intelligence.—*Trotter v. St. Louis & Suburban Ry. Co.*, 99 S.W. 508, 122 Mo. App. 405.

**App. 1908.** An instruction, in an action against a carrier for injuries to a passenger by the derailment of the coach, that the burden was on the carrier to prove that the coach, the engine, roadbed, tracks, and ties were reasonably safe "so far as human skill, diligence, and foresight could provide, \* \* \* and that by the utmost human skill, diligence, and foresight is meant such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances," is not erroneous, though no standard by which to measure the carrier's duty is furnished by requiring it to exercise care so far as human skill, diligence, and foresight can provide.—*Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S.W. 1082, 130 Mo. App. 162.

**App. 1912.** An instruction, in an action for personal injuries to a street car passenger in a collision, which predicated a finding for plaintiff merely upon stating the presumption of negligence arising upon the occurrence of the accident, and the burden of rebutting negligence, without hypothesizing the question whether defendant had rebutted the presumption of negligence by its evidence, was erroneous.—*Meegan v. Metropolitan St. Ry. Co.*, 142 S.W. 1104, 161 Mo. App. 45.

**App. 1914.** In passenger's action for injuries caused by derailment, instruction denying him the benefit of the presumptions under the rule of *res ipsa loquitur* held improperly given.—*Crowell v. St. Joseph & G. I. Ry. Co.*, 163 S.W. 278, 177 Mo. App. 111.

**App. 1920.** In a *res ipsa loquitur* case against a street railway for injuries to a passenger when the street car collided with a team of horses, a charge of general negligence is proper.—*Yates v. United Rys. Co. of St. Louis*, 222 S.W. 1034.

**App. 1923.** In an action for death of a passenger, an instruction for plaintiff that if deceased was a passenger on defendant's cars and while it was being run by defendant's servants and employes and caused to collide with another car, resulting in injuries to deceased, from which he died, the law presumed that the collision was through defendant's negligence, unless the jury believe from all

the evidence that the collision occurred through no fault or negligence of the defendant *held* proper.—*Faulk v. Kansas City Rys. Co.*, 217 S.W. 253.

**App. 1926.** Instruction that, to defeat injured passenger's recovery, burden was on carrier to rebut presumption of negligence when train was wrecked by fall of bridge, and to show that wreck was caused solely by an extraordinary rain storm, *held* proper under the evidence.—*Whitlow v. St. Louis-San Francisco Ry. Co.*, 282 S.W. 525, certiorari quashed (1927) *State ex rel. St. Louis & S. F. R. Co. v. Daues*, 290 S.W. 425.

**App. 1926.** Instruction putting burden on passenger, injured by derailment, to prove every fact by preponderance of evidence necessary to recovery *held* misleading.—*Watson v. Chicago Great Western R. Co.*, 287 S.W. 813, 221 Mo. App. 621.

Instruction putting burden on passenger injured by derailment to prove every fact necessary for recovery *held* error where general instruction authorized recovery unless derailment could have been avoided by highest care.—*Id.*

**App. 1927.** Evidence of cause of collision between street car and motorbus *held* not to preclude submission of personal injury action under *res ipsa loquitur* doctrine.—*Stegman v. People's Motorbus Co. of St. Louis*, 297 S.W. 189, 193.

#### 321 (22). Damages.

**Sup. 1904.** In an action against a carrier for the recovery of actual and exemplary damages for the act of one of its conductors in kicking plaintiff, a messenger boy 13 years of age, over the heart, as he was attempting to board the car as a passenger, an instruction that, in assessing plaintiff's damages, the jury were not limited to the physical injuries inflicted, but, in addition, if they found the assault was malicious, they might allow punitive damages, and defining the term "malicious" to mean the intentional doing of a wrongful act without just cause or excuse, though without spite or ill will, sufficiently and properly defined what was necessary to entitle plaintiff to recover exemplary damages.—*McNamara v. St. Louis Transit Co.*, 81 S.W. 880, 182 Mo. 676, 66 L. R. A. 486.

**App. 1903.** A charge on exemplary damages, when requested, is proper in an action against the carrier for assault and battery on a passenger in a street car who is maliciously



assaulted by the conductor.—*Ickenroth v. St. Louis Transit Co.*, 77 S.W. 162, 102 Mo. App. 597.

**App. 1013.** In an action against a railroad company for assault by its station agent upon plaintiff, an instruction that the jury will assess a further sum by the way of punitive damages if the assault was malicious, *held* improper as being mandatory instead of permissive.—*Geary v. St. Louis & S. F. R. Co.*, 158 S.W. 736, 173 Mo. App. 248.

**App. 1917.** An instruction on punitive damages *held* not erroneous for failure to require a finding of the lustful character of the assault, especially where other instructions required such finding a prerequisite to a verdict for passenger.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S.W. 371.

In passenger's action for wanton and willful assault, *held*, not error to instruct that the jury could in their discretion assess punitive damages as a punishment, and as a protection to society, and a warning to others.—*Id.*

**App. 1919.** In an action by a passenger for alleged wrongful assault by the conductor, an instruction given at the request of the company *held* erroneous in requiring the jury to find facts which would entitle the passenger to punitive damages as a condition to awarding compensatory damages.—*Parris v. Deering Southwestern Ry. Co.*, 208 S.W. 97, 203 Mo. App. 182.

### 321 (23). Conformity to pleadings and issues.

**Sup. 1880.** Where there was no time after the discovery of the danger to a passenger attempting to alight while the train was in motion to exercise care on the part of the employes in charge of the train to prevent injury, an instruction that, though the passenger might have been negligent, which negligence contributed to the injury, yet he could recover if the servants in charge of the train could have prevented the injury by the use of ordinary care, and failed to do so, was erroneous, not being appropriate to the facts.—*Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414.

Where the petition in an action against a railway company for damages sustained by a passenger alleged that the company was negligent in failing to stop its train at a station to enable the passenger to alight, an instruction asserting that if the passenger, by the negligence of any of the servants of the com-

pany while getting off the train without fault on his part, received the injuries complained of, he was entitled to a verdict, was erroneous, because it failed to confine the negligence to that which was specifically alleged in the petition.—*Id.*

**Sup. 1882.** Where plaintiffs in their petition based their right to recover for negligence of defendant in running its trains over a portion of the road rendered dangerous by reason of having been undermined by a flood of water, an instruction was erroneous which authorized a recovery for an injury arising out of defective construction, or defective ties or material used on said road.—*Ely v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 34.

**Sup. 1899.** In an action for the death of a street-car passenger from injuries caused by the car in which he was riding colliding with an obstruction on the track while the passenger was riding on the footboard of the car preparatory to getting off, the charge being negligence, in that the collision could have been avoided with ordinary care, an instruction that the carrier is liable if the injury was the result of even slight negligence in the management of the train, is not erroneous as enlarging the issues.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

**Sup. 1899.** Where a petition stated that defendant railroad company, by negligently permitting a hole to remain in its depot platform, and by the negligence of its servants in extricating plaintiff from said hole, injured plaintiff, it is not error to embody in an instruction the ground of recovery based alone on the negligence in permitting said hole to be in the platform.—*Robertson v. Wabash R. Co.*, 53 S.W. 1082, 152 Mo. 382.

**Sup. 1900.** Where, in an action against a street-railway company for injuries to a passenger, the petition charges negligence in starting a car while plaintiff was alighting, after slowing it down to enable him to alight, and the court instructs that on plaintiff's signaling his desire to alight at a certain street it was the duty of defendant's servants to exercise a high degree of care to so manage its cars that plaintiff might safely alight, defendant's objection that the instruction does not conform to the negligence alleged is overcome by other instructions that the only allegation of negligence was that the car was slowed up to allow plaintiff to alight, and negligently started forward while he was in the act of alighting, and that plaintiff must

prove such allegation, and that, if he was injured from some other cause, or in some other way, he could not recover.—*Grace v. St. Louis R. Co.*, 56 S.W. 1121, 156 Mo. 295.

**Sup. 1904.** In an action for injuries to a passenger alighting from a street car, there was no necessity for instructions on the care to be exercised by defendant in preventing the sudden starting of the car, where there was no claim by defendant that the car had started from a cause beyond its control, but its defense was a denial that the car had stopped for the passenger to alight, but was moving at a speed rendering it dangerous for her to so do.—*Reagan v. St. Louis Transit Co.*, 79 S.W. 435, 180 Mo. 117.

**Sup. 1904.** In an action against a railroad company for injuries to a passenger from stepping off a moving train, the petition charged negligence in failing to direct plaintiff what train to take. An instruction stated that if plaintiff got on the wrong train through failure of defendant to have any one there to direct him, being told by a porter on that train that it was the train he desired to take, and afterwards, on further explanation, told that it was not and directed to jump off, etc., he was entitled to recover. *Held* not objectionable on the ground that it authorized a recovery upon the misdirection of the porter, when the petition alleged a failure to give any direction.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

**Sup. 1904.** A petition, in an action for personal injuries sustained in a railway collision, which alleged that the servants in charge of the car on which plaintiff was riding ran it at a dangerous rate of speed, and that defendant negligently ran a car in the opposite direction on the same track, thereby causing the collision, sufficiently charged defendant with negligence in allowing the collision, so as to warrant an instruction on that theory.—*Magrane v. St. Louis & Suburban Ry. Co.*, 81 S.W. 1158, 183 Mo. 119.

**Sup. 1904.** In an action for injuries to a passenger on a street car, the only theory on which plaintiff was entitled to recover under her pleadings and evidence was that the car had stopped, and was negligently started while the passenger was attempting to alight. Defendant's testimony was that the passenger attempted to alight from the car while it was moving, in disregard of a warning from the conductor. Defendant requested a charge that plaintiff could not recover if the

passenger's injury was caused by her act in stepping from the car while in motion. The court modified the request by adding thereto, the words "after being warned by the conductor not to do so." *Held* that, while the instruction as modified was proper, yet, as there could be no recovery, under defendant's evidence, regardless of the question of warning or no warning, the refusal to give the requests as asked was error.—*Behen v. St. Louis Transit Co.*, 85 S.W. 346, 186 Mo. 430.

**Sup. 1906.** In an action against the owner of a building for injuries to one riding, according to custom, on a freight elevator while engaged in moving the effects of a tenant, plaintiff requested an instruction that due care as used in the instructions meant care commensurate with the means being used and the danger to be apprehended, and that defendant was bound to use that high degree of care which prudent and competent men would exercise under like circumstances. *Held*, that the refusal of the instruction was error, notwithstanding that plaintiff's petition had alleged specific acts of negligence, placing the burden upon him to prove such acts, since, irrespective of where the burden of proof lay, the measure of care was the same.—*Orcutt v. Century Bldg. Co.*, 99 S.W. 1062, 201 Mo. 424, 8 L. R. A. (N. S.) 929.

**Sup. 1909.** Where the petition alleged that, while plaintiff was attempting to walk from the rear vestibule into the car, he stepped one foot upon the metallic cover of the said receptacle, and the other upon the metallic part of the door sill, and was injured by an electric shock, an instruction to find for plaintiff if he stepped upon said metallic cover and upon the metallic sill, and received from them "or either of them" an electric shock, was erroneous as being broader than the allegations, and authorizing a recovery if he was shocked by stepping on either the sand cover or the sill.—*Black v. Metropolitan St. Ry. Co.*, 117 S.W. 1142, 217 Mo. 672.

**Sup. 1909.** In an action for injuries to a passenger by the premature starting of a street car as she was in the act of alighting, the court charged that plaintiff could recover if the jury found that defendant's servant in starting the car neglected to observe the degree of care defined in a prior instruction as the care devolving on a carrier of passengers, but that the burden was on plaintiff to show that while she was in the act of alighting, but before she had reasonable opportunity to do so, it was suddenly started, etc. *Held*,

that the court sufficiently charged on the issue whether plaintiff had been given a reasonable opportunity to alight.—*Westervelt v. St. Louis Transit Co.*, 121 S.W. 114, 222 Mo. 325.

**Sup. 1910.** Where, in an action for injuries to a street car passenger, the petition, which was unamended, alleged that the car was started suddenly and rapidly, and that defendant's servants should, or by diligence could, have known that plaintiff was in the act of boarding, an instruction correctly reciting the negligence pleaded, and charging that no other acts or conduct on defendant's part would authorize a recovery, and if plaintiff failed, by a preponderance of the proof, to show that she received her injuries as alleged, she could not recover, was not error.—*Sterrett v. Metropolitan St. Ry. Co.*, 123 S.W. 877, 225 Mo. 99.

**Sup. 1919.** In a passenger's action for personal injuries sustained while alighting from a street car immediately after having boarded it, on the conductor's information the car was going to the barn, an instruction imposing as a condition of liability the negligence of the conductor in signaling to go ahead as dependent on the conductor's knowledge that plaintiff understood he was to leave the car, *held* to require a finding on an immaterial issue.—*Chapman v. Kansas City Rys. Co.*, 217 S.W. 290.

**Sup. 1920.** In action against street railway for injuries received on station platform, based on theory that relation between defendant and plaintiff had been that of carrier and passenger, instruction charging defendant with duty of exercising highest degree of care, without requiring jury to find that relation of carrier to passenger must have existed at time of accident, *held* erroneous.—*Banks v. Kansas City Rys. Co.*, 217 S.W. 488, 280 Mo. 227.

**Sup. 1920.** Allegations of negligence, in a petition in an action for injuries to a passenger in a collision between a street car and a freight train, *held* general, so that court did not err in authorizing recovery in its instructions on findings of specific acts of negligence.—*Bergfeld v. Kansas City Rys. Co.*, 227 S.W. 106, 285 Mo. 654.

**Sup. 1921.** In an action for being pushed off the step of a moving street car by the closing of the vestibule door, an instruction to find for plaintiff if the conductor negligently caused the car to start forward and negligently closed the door while it was mov-

ing, as a direct result of which plaintiff was "thrown from the car," was no broader than the pleadings, though it omitted to require a finding that plaintiff was "pushed off the step" as alleged; a finding that plaintiff was "thrown from the car" being fairly alike in significance and not misleading.—*Pietzuk v. Kansas City Rys. Co.*, 232 S.W. 987, 280 Mo. 135.

**Sup. 1921.** Plaintiff, in an action for injury in alighting just after boarding a street car on being informed that it was going to the barn, having testified to a positive agreement with the conductor that the conductor would stop and he would get off there, defendant's requested instruction was properly modified by insertion of the quoted words, so as to read as follows: Even if plaintiff did get on the car and his bundle was kicked therefrom, "in the absence of any agreement to stop, if you so find," this did not require the crew to stop the car to permit plaintiff to alight till it had reached the next regular stopping place.—*Chapman v. Kansas City Rys. Co.*, 233 S.W. 177.

**Sup. 1921.** Where the petition in a street car passenger's action for injuries alleged that the car was moved with a sudden and unexpected jerk, and with such force as to throw some one against the door, breaking it, and causing the glass to strike plaintiff in the face, an instruction hypothesizing such facts sufficiently required a finding that the jerk was unusual and extraordinary.—*Laycock v. United Rys. Co. of St. Louis*, 235 S.W. 91, answering certified questions (App. 1920) 227 S.W. 883.

**Sup. 1921.** Requested instructions that there could be no punitive damages if defendant's act in running its elevator without replacing the cables was due to mere inadvertence was properly refused as without support in the evidence, where plaintiff's evidence showed notices from an inspector, and defendant's evidence was that his engineer daily examined the cables and judged them safe.—*Reel v. Consolidated Inv. Co.*, 236 S.W. 43.

**Sup. 1922.** In action by one injured by prematurely closing the doors and raising the step of a street car while attempting to board the same *held*, under the evidence, that the court was warranted in refusing an instruction as to injuries resulting from accident.—*Maloney v. United Rys. Co. of St. Louis*, 237 S.W. 509.

Where, in an action for injuries in attempting to board a street car the evidence

shows conclusively that the car was standing still when plaintiff attempted to enter, the court properly refused an instruction in her favor if car was in motion.—*Id.*

**Sup. 1922.** A petition in a suit against a street railroad *held* sufficiently broad to include issues presented by an instruction predicated on an assault and wanton injury by a conductor independent of the relation of carrier and passenger.—*State ex rel. United Rys. Co. of St. Louis v. Allen*, 240 S.W. 117.

**Sup. 1922.** Where the petition alleged an ordinance limiting the speed of automobiles to 8 miles an hour in the business district and 10 miles an hour elsewhere, and alleged that the taxicab in which plaintiff was riding and the automobile which collided therewith were both being operated in the business portion at a rate of speed in excess of 10 miles an hour, to wit, 35 miles an hour, etc., it was broad enough to cover the negligence whether the proof showed the point of collision to be in the business district or elsewhere, and authorized instructions predicating a recovery on the operation of each automobile at a rate of speed exceeding 8 miles an hour.—*Varley v. Columbia Taxicab Co.*, 240 S.W. 218.

**Sup. 1923.** Where plaintiff claimed she was injured when she was thrown to the ground by the sudden starting of a street car from which she alighted, while defendant's conductor testified she had reached the ground in safety, when her ankle turned and she fell forward on her face, evidence that she had injuries on her back, in addition to injuries on the abdomen, heart, and forehead, does not show that she must have been thrown off a suddenly moving car, so that it was not error to instruct the jury that the mere fact that she was injured was no evidence of negligence. (Per *Woodson and Graves, JJ.*)—*Moss v. Wells*, 249 S.W. 411.

**Sup. 1923.** In an action against a street railroad for injuries to a passenger alleged to have been caused by the negligence in causing the car to be violently and suddenly jerked in an unusual manner so that plaintiff was violently thrown into the street, instruction charging the railroad with the exercise of "the highest reasonable, practical degree of care and foresight to safely carry plaintiff and allow her a reasonable time to safely alight from said car" *held* not erroneous, although there was no issue as to whether the railroad had failed to allow the passenger a reasonable time to alight, where such instruc-

tion was merely a recital of the duty of a carrier to a passenger and the instruction submitting the question of negligence was confined to the issue made by the pleadings.—*Connor v. Kansas City Rys. Co.*, 250 S.W. 574, 298 Mo. 18.

**Sup. 1925.** Instruction in action for personal injuries *held* not based on facts.—*Unterlachner v. Wells*, 278 S.W. 79.

**Sup. 1925.** Instruction requiring highest care *held* not to broaden issues.—*Taylor v. Missouri Pac. R. Co.*, 279 S.W. 115, 311 Mo. 604.

**Sup. 1927.** Instruction authorizing jury to find street car was running at negligent speed *held* proper under petition and evidence.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

**Sup. 1927.** In action against railroad for injuries to railway mail clerk on duty, instruction authorizing verdict for defendant under specified circumstances *held* properly refused where not considering certain facts which might have constituted negligence.—*Schelpers v. Missouri Pac. R. Co.*, 298 S.W. 51.

**Sup. 1927.** Instructions in passenger's action for injuries relative to defendants' liability which were no broader than general negligence pleaded, *held* sufficiently specific.—*Hulen v. Wheelock*, 300 S.W. 479, 318 Mo. 502.

**Sup. 1928.** Evidence that elevator operator stated car must be broken authorized instruction on defendant's duty to invitee in maintaining and constructing elevator.—*Roberts v. Schaper Stores Co.*, 3 S.W.(2d) 241, 318 Mo. 1190.

**Sup. 1928.** Specific allegation of negligence in starting street car as plaintiff was boarding it precluded objection to instruction as inapplicable to *res ipsa loquitur* case.—*Stolovey v. Fleming*, 8 S.W.(2d) 832.

**Sup. 1928.** Instruction requiring finding that motorman negligently permitted collision, before awarding plaintiff damages, *held* not at variance with petition, alleging motorman's negligence in failing to check speed.—*Morris v. Union Depot Bridge & Terminal R. Co.*, 8 S.W.(2d) 11.

**Sup. 1928.** Instruction that street railway was not liable for acts of police officer *held* proper under issues in action for death of passenger.—*Kirkpatrick v. Wells*, 6 S.W.(2d) 591, 319 Mo. 1040.

**App. 1888.** In an action against a railroad for injuries to a passenger, the petition charged that defendant negligently passed beyond the depot, which, when plaintiff ascertained, he tried to retrace his steps within the car, whereupon defendant negligently put on a full head of steam, thereby jerking the car with such force and speed as to throw plaintiff off. The evidence introduced was confined strictly within the limits of the petition. *Held*, that an instruction predicated on defendant's so carelessly managing the train as to throw plaintiff off the car did not present an issue outside of the pleadings.—*Schultze v. Missouri Pac. Ry. Co.*, 32 Mo. App. 438.

**App. 1889.** In an action against a railroad company for injuries to a passenger alleged to have been caused by negligence of defendant's servants in instructing him to alight from the train at a certain point while the train was moving, an instruction predicating a right of recovery upon the failure of the defendant to stop its train at that point was erroneous, because presenting an issue not made by the pleadings.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 36 Mo. App. 203.

**App. 1891.** In an action for injuries, a charge submitting to the jury whether the wrongful acts of defendant's servants were within the scope of their authority was properly refused, where it was not controverted, either by the pleadings or evidence, that such acts were within the scope of their authority.—*Mackin v. People's St. Ry. & Electric Light & Power Co.*, 45 Mo. App. 82.

**App. 1894.** In an action against a carrier by a passenger for injuries received in jumping from a moving train on the brakeman's calling out to jump, when there was no danger at hand, there can be no recovery unless the alarm was negligently given, and the passenger's belief in the imminence of the danger in remaining on the train was such as an ordinarily prudent man would have entertained under the same circumstances, and his action was such as would probably have been taken by a prudent man, and was free from contributory negligence; and therefore it was error to recite in an instruction, as a fact, that the whistle to stop the train, on which the brakeman acted, and at the same time gave the alarm to jump, was sounded at a place remote from a station, switch, or siding, there being no evidence that the passenger knew this.—*Eppland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

**App. 1894.** Where the petition in an action for negligence did not set up that the accident was due to the absence of a watchman where defendant's street cars crossed railroad tracks, an instruction to find for plaintiff if the injury was caused by any neglect or incompetency of the watchman was erroneous.—*Jacquín v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

Under a petition charging a street railroad with negligence in not providing proper brakes, sand boxes, sand, and stopping appliances to stop and control their cars, an instruction that it rests on defendant to prove that said road, roadbed, tracks, cables, cars, grips, grip irons, brakes, machinery, appliances, etc., were safe, sound, trustworthy, and reliable, and were skillfully operated, was erroneous, in authorizing a recovery for negligence as to matters as to which the petition did not charge negligence.—*Id.*

An instruction that it rests on defendant to prove that the road etc., were safe, sound, reliable, and trustworthy, and were carefully and skillfully operated, and the accident arose from and was caused by inevitable accident or defect that could not have been foreseen by the exercise of the utmost practicable care, etc., is erroneous, where the defense was that the accident was due to wet tracks and the shortness of the distance of the cars from the place of the accident, as it excluded the defense set up from the jury and interposed another in its place.—*Id.*

**App. 1894.** Where plaintiff's petition alleged, first, the negligent failure of defendant to light up the platform where passengers were in the habit of entering and leaving trains, and, second, that defendant carelessly deposited or permitted to be deposited an obstruction on its platform, and there was evidence tending to support the first allegation, it was error to instruct the jury that the mere existence or nonexistence of the alleged obstruction comprised the whole case, thus shutting out entirely the charge of the failure to light up the passenger platform, which was the gravamen of the plaintiff's complaint.—*Waller v. Missouri, K. & T. Ry. Co.*, 59 Mo. App. 410.

**App. 1895.** Where, in an action for personal injuries, the petition alleged, and substantial evidence was adduced by plaintiff to show, that she was thrown from the platform of the car by its forward motion, an instruction authorizing a recovery in such case was justified by the petition and evidence.—

**Hanks v. Chicago & A. Ry. Co.**, 60 Mo. App. 274.

**App. 1897.** An instruction, in an action against a street railway company for injuries received in attempting to board a car, that if plaintiff attempted to board the car at a place where the cars were in the habit of stopping to receive passengers, and he had reason to believe that the car was stopping for passengers at said place, and plaintiff attempted to board the car, and the servants in charge of the car knew, or by the exercise of ordinary care would have known, that plaintiff was attempting to board the car, but suddenly started the same before plaintiff had a reasonable time to board it, plaintiff would be entitled to recover, is erroneous, as being outside the issues; the petition stating a cause of action based on the ground that plaintiff attempted to board a car that was standing still.—**Worthington v. Lindell Ry. Co.**, 72 Mo. App. 162.

**App. 1900.** Where, in an action by a passenger for personal injuries, there was no allegation in the petition justifying a recovery of exemplary damages, and there was no testimony tending to show that the engineer, in stopping the train, had acted wantonly, maliciously, or unlawfully, with intent to injure the passengers, it was error to give an instruction on the subject of exemplary damages.—**Dorsey v. Atchison, T. & S. F. Ry. Co.**, 83 Mo. App. 528.

**App. 1903.** Though one injured while attempting to board a street car sues on the ground that the car was started too soon, it is not error to give a correct instruction as to the duty to stop a car a reasonable time to allow one to get safely on, whether the car was at an actual standstill when he attempted to get on, or was slowly moving, and started up suddenly, without coming to a full stop.—**O'Mara v. St. Louis Transit Co.**, 76 S.W. 680, 102 Mo. App. 202.

**App. 1904.** In an action against a street railway company for injuries alleged to have been caused by negligence of defendant in allowing a gate on the rear platform of one of its cars to remain insecurely fastened, so that it swung open, allowing plaintiff to fall, the court instructed the jury to consider all the circumstances shown by the evidence. This was followed by a charge that the actual issue was that the gate was not securely fastened, and that there was no issue that the gate was not properly made or of a safe kind, or the fastenings not of a safe

kind. *Held* not erroneous as allowing a recovery on negligence not pleaded.—**Aston v. St. Louis Transit Co.**, 79 S.W. 999, 105 Mo. App. 226.

**App. 1905.** In an action for injuries sustained in alighting from a street car, where plaintiff alleged that after the car came to a full stop at the usual place for cars to stop for the purpose of permitting passengers to alight, etc., and there was no evidence that the car stopped from any other cause than to discharge passengers, instructions submitting the hypothesis of the car stopping at a place where passengers were in the habit of alighting from some other cause than that of discharging passengers were misleading and confusing.—**Corum v. Metropolitan St. Ry. Co.**, 88 S.W. 143, 113 Mo. App. 631.

**App. 1905.** A petition against a street railway and railroad for injuries to a passenger in a street car, resulting from a collision between the street car and a railroad car, alleged that defendants were guilty of negligence in failing to keep a necessary lookout and observe the approach of the railroad car. The court charged generally to find for plaintiff, if the defendant street railway failed to use the highest degree of care toward plaintiff, or if the defendant railroad failed to observe ordinary care, and such failure resulted in or contributed to plaintiff's injury. *Held*, that the charge was erroneous, in that it failed to condition the right of recovery on the establishment of the negligence charged in the petition.—**Hamilton v. Metropolitan St. Ry. Co.**, 89 S.W. 893, 114 Mo. App. 504.

**App. 1905.** Where, in an action for injuries to a street car passenger, the complaint alleged negligent operation of the car and that all the electric appliances of the car were defective, an instruction that if the explosion, flame and burning of the car were caused by any defect in the condition of the car or the apparatus thereof, or by any improper management resulting from any negligence on the part of the defendant, or its agents and servants, etc., plaintiff was entitled to recover, was not objectionable as submitting a cause of action not stated in the petition.—**Brod v. St. Louis Transit Co.**, 91 S.W. 993, 115 Mo. App. 202.

**App. 1906.** In an action for injuries to a passenger, an allegation in the petition that it was defendant's duty to maintain the car, disconnected from the charge of negligence, was insufficient to justify an instruction au-

thorizing the jury to put defendant's negligence on the ground that it did not properly maintain the car.—*Briscoe v. Metropolitan St. Ry. Co.*, 95 S.W. 276, 118 Mo. App. 608.

**App. 1907.** In an action against a street railway for injuries received by a passenger through being thrown from the platform of a car by a sudden lurch, an instruction permitting a recovery on the ground of excessive speed when there was no allegation that the car was going at an excessive rate was not erroneous, the petition alleging generally that the injury resulted from defendant's negligence "in the construction, maintenance and operation of said line and car."—*Baskett v. Metropolitan St. Ry. Co.*, 101 S.W. 138, 123 Mo. App. 725.

**App. 1907.** Where, in an action against a street railway company, the petition charges, and the evidence of plaintiff shows, that she was thrown by a sudden and violent start of the car made when she was stepping onto the foot board to become a passenger, and the evidence of the company showed that the car did not stop and plaintiff made no attempt to board it, and the jury were told that a recovery could be had on no other ground than that plaintiff was thrown from the foot board before she had time to secure her footing, an instruction authorizing a recovery if the car was suddenly started without allowing plaintiff a reasonable time to board it and become seated thereon was not objectionable as charging, as a matter of law, that it was the duty of the company to hold the car stationary until plaintiff had been given a reasonable time in which to seat herself.—*Miller v. Metropolitan St. Ry. Co.*, 102 S.W. 592, 125 Mo. App. 414.

**App. 1909.** Where the petition alleged that, while plaintiff was alighting from the car, it was negligently jerked and backed, causing plaintiff to "fall against the depot platform," etc., an instruction authorizing a recovery if because of defendant's negligent act plaintiff was injured was not erroneous in failing to require a finding that plaintiff fell against the platform; it being immaterial whether she fell against the platform or the earth.—*Van Cleave v. St. Louis, M. & S. E. Ry. Co.*, 118 S.W. 116, 137 Mo. App. 332.

**App. 1910.** Where deceased, when thrown from a street car and injured, had been riding on the back platform, and had not at any time ridden inside the car, as alleged in the petition, instructions that if, as the car approached decedent's destination,

he passed out on the back platform to alight when he reached his destination, and while on the platform, and before the car reached such destination it sustained an unusual jerk by reason of defendant's servants carelessly causing it to be brought to a standstill and then suddenly starting it forward, whereby decedent lost his balance, etc., plaintiff was entitled to recover, were erroneous as inapplicable to the evidence.—*Ely v. Southwest Missouri R. Co.*, 125 S.W. 833, 141 Mo. App. 708.

**App. 1910.** Proof of substantially less speed than 15 miles per hour did not sustain a petition alleging that defendant's street car was being negligently run at the rate of 15 miles per hour, and hence instructions not requiring the jury to find that the car was being run at as great a speed as 15 miles before they could find for plaintiff were erroneous.—*Moore v. Metropolitan St. Ry. Co.*, 126 S.W. 181, 142 Mo. App. 290.

**App. 1910.** The instruction limiting inquiry to negligence in "the management and control of said passenger train and coach" is not broader than the charge of the petition that defendant "carelessly and negligently operated and ran its train" in which plaintiff was riding as a passenger.—*Marriott v. Missouri Pac. Ry. Co.*, 126 S.W. 231, 142 Mo. App. 199.

**App. 1910.** Where a petition alleges that a carrier suddenly and negligently moved the train backward, whereby plaintiff, who was attempting to alight, was thrown and injured, and plaintiff's instructions based the negligence on the negligent starting of the train while in the act of alighting, it is not error to give defendant's instructions, placing the burden on plaintiff to prove that the trainmen suddenly and negligently jerked the train backward, since the petition and plaintiff's instructions based a cause of action on violent and negligent jerking and not in merely starting the train.—*Craig v. Wabash R. Co.*, 126 S.W. 771, 142 Mo. App. 314.

**App. 1910.** In a cable car passenger's action for personal injuries, alleged to have been caused by the sudden stopping of the car by the negligence of the gripman in not releasing the cable from the grip at a street corner where the cable ran under and crossed another cable, causing the grip to come in contact with appliances under the ground, an instruction, which was the only charge on negligence, that defendant was bound to operate its cars with the highest reasonably

practical degree of care of a very prudent person, in view of the circumstances shown by the evidence, was erroneous for not being limited to the specific acts of negligence alleged in the petition.—*Detrich v. Metropolitan St. Ry. Co.*, 127 S.W. 603, 143 Mo. App. 176.

**App. 1911.** In a negligence action, the instructions must require a finding upon the negligent acts revealed in the evidence, and where the petition alleged specific acts of negligence of defendant street railway company's motorman as causing the injury, to the effect that he so negligently and carelessly managed the car that he suffered it to be collided with by runaway horses, crossing the track at an intersecting street, which allegations were supported by direct proof, it was error to charge authorizing a recovery against defendant if the jury should find that plaintiff was exercising ordinary care at the time unless they should find that the collision could not have been avoided by the motorman in charge of the car by the exercise of high care, thus omitting to hypothesize the facts with respect to the alleged negligence of the motorman and permitting the jury to find for plaintiff in the event of other negligence of defendant.—*Miller v. United Rys. Co. of St. Louis*, 134 S.W. 1045, 155 Mo. App. 528.

**App. 1911.** It is not error to instruct the jury as to the legal relation between a carrier and a passenger, when such information is pertinent to the issues.—*Zeiler v. Metropolitan St. Ry. Co.*, 134 S.W. 1067, 153 Mo. App. 613.

Where the petition in an action for injuries to a street car passenger alleged that the car was caused "and" permitted to move, throwing the passenger from the car while alighting, a charge authorizing a verdict if the car was caused "or" permitted to move was not objectionable as broadening the cause of action pleaded, the gravamen of which was negligence in allowing the car to prematurely start.—*Id.*

**App. 1911.** In an action against a street car company, where the petition alleged and the proof showed that the plaintiff's sister-in-law gave the signal to stop at a certain street, it was immaterial whether the plaintiff signaled or not, so an instruction requiring the jury to find that the plaintiff signaled was not a variance; there being no failure of substantive facts.—*Holland v. Metropolitan St. Ry. Co.*, 137 S.W. 995, 157 Mo. App. 476.

**App. 1918.** In a passenger's action against a street car company for injuries sus-

tained while alighting from a car, an instruction directing a verdict for plaintiff if the car started before she had time to alight did not submit a different act of negligence from that pleaded, where it submitted only one of the specifications of negligence pleaded, and omitted others.—*Bond v. Metropolitan St. Ry. Co.*, 204 S.W. 934.

**App. 1918.** In a passenger's action for personal injuries alleged to have been caused by a sudden and violent start of defendant's street car, an instruction submitting the mere starting of the car before the plaintiff had taken a seat was erroneous.—*Murdock v. Dunham*, 206 S.W. 915.

**App. 1919.** In passenger's action for injuries while aiding brakeman in unloading freight at brakeman's request, made while passenger was on station platform, instruction as to railroad's duty in management and operation of train with highest degree of care was misleading; the negligent act causing injury having no connection with operation and management of train.—*Shaffer v. St. Louis & S. F. Ry. Co.*, 208 S.W. 145, 201 Mo. App. 107.

**App. 1919.** Where passenger asserted motorman was negligent in opening the door which was an invitation to passengers to alight before the car fully stopped, an instruction that if the passenger relied on the custom, and the motorman negligently opened the door before bringing the car to a full stop, and the passenger being unaware of the movement stepped off the car, etc., verdict should be for him, is not open to objection that the only negligence alleged was a violation of the custom, while the instruction submitted negligence in allowing the car to proceed after the door was opened.—*Tillery v. Harvey*, 214 S.W. 246.

In action by a passenger who asserted that he was injured in alighting by negligence of motorman opening door, which was an invitation to passengers to alight, before the car had been brought to a full stop, refusal of defendant's requested instruction on accident was proper, though defendant asserted plaintiff merely tripped, the instructions given having correctly charged that unless the jury found defendant negligent no recovery could be had, for, had the instruction on accident been given, the jury might have been misled into denying recovery though the injury occurred as claimed by plaintiff.—*Id.*

**App. 1919.** In an action for personal injuries to plaintiff while attempting to board defendant's street car because of a violent



jerk of the car while starting, an instruction *held* not erroneous as submitting the negligent failure to stop the car, resulting in plaintiff's being dragged and hurt, which failure had not been pleaded.—Paul v. Dunham, 214 S.W. 263.

In an action for personal injuries from being thrown and dragged while attempting to board defendant's street car, evidence of permanent injuries *held* sufficient to justify an instruction on that subject.—Id.

**App. 1920.** In an action by a passenger for personal injuries, where plaintiff's theory was that the car came to a stop, and as she was on the step getting off the motorman closed the car door upon her coat and started the car, thus throwing her to the street and dragging her, and defendant's theory was that plaintiff fell by reason of attempting to alight before the car stopped, court did not err in not requiring the jury to find that plaintiff was not given a reasonable time to alight.—Chapman v. Kansas City Rys. Co., 217 S.W. 623.

**App. 1920.** In an action by passenger for personal injuries received when thrown from vestibule of car by sudden jerk, where petition alleged that car "slowed down or stopped," and the evidence showed that it had been stopped or moved very slowly when plaintiff attempted to alight, court did err in refusing defendant's instruction, which told the jury that if the car stopped but once plaintiff was not entitled to recover, since such instruction would have been misleading, the car having stopped after the jerk, since there might have been but one stop, and plaintiff would have been entitled to recover.—Roach v. Kansas City Rys. Co., 228 S.W. 520.

**App. 1920.** An objection that an instruction, stating a passenger was proceeding from the entrance of the vestibule toward the interior of a street car, was broader than the petition and evidence which showed that she was proceeding from the entrance and vestibule of the car toward the interior thereof is without substance.—Ownby v. Kansas City Rys. Co., 228 S.W. 879.

**App. 1921.** In action for injuries to live stock attendant, riding in freight car with stock, from sudden stop of train, causing horse to fall upon him, where case was not based on the theory that the trainmen, knowing attendant to be in the car, failed to use proper care to avoid injuring him, and where there was evidence that the trainmen did not know he was in the car, submission of issue as to whether trainmen knew or had good cause to

believe that he was in the car and liable to be injured, in time to have avoided the injury, *held* error.—Vulgamott v. Hines, 229 S.W. 394.

**App. 1921.** In an action for injuries to plaintiff when she was thrown from the step of a street car which she had boarded, by its premature starting, plaintiff's instruction covering the case and permitting verdict for plaintiff, though she had not boarded the car, but had merely taken hold of the handrail, *held* erroneous as not submitting the cause of action on the basis afforded by the pleadings and evidence.—Lairson v. Kansas City Rys. Co., 232 S.W. 484.

**App. 1921.** In an action for injuries, wherein the petition alleged a street car started with a "sudden jerk" as plaintiff was alighting therefrom, an instruction in favor of plaintiff if the car was "suddenly started forward" with such force as to throw her to the street was not reversible error, though it did not use the word "jerk," the words used conveying practically the same idea, and the gist of the negligence averred being the premature starting of the car.—Lass v. Kansas City Rys. Co., 233 S.W. 70.

In an action for injuries from being thrown to the platform by the sudden starting up of a car from which plaintiff was alighting, an instruction that the conductor was not bound to anticipate that she would attempt to alight while the car was in motion, and that if, when such intention became manifest, it was too late to prevent her, plaintiff could not recover, was properly refused, being outside the issues, the only question being whether the car was still when plaintiff attempted to get off and started up while she was doing so, and its only effect being to divert and confuse the minds of the jury.—Id.

**App. 1921.** Allegation in a petition that the "defendant, its agents, servants, and employees in charge of and operating the car, \* \* \* carelessly and negligently caused and permitted said car \* \* \* to strike and collide with another car upon the same track," etc., *held* a general charge of negligence as to operating the car on which plaintiff was riding, and not specific negligence, though the crowded condition of the car was alleged, but only in explanation of plaintiff standing where she did, and the case was properly submitted under a general charge as to such negligence causing the collision, there being no question of any persons other than those in charge of the car on which plaintiff was rid-

ing being at fault.—*Johnson v. Kansas City Rys. Co.*, 233 S.W. 942.

**App. 1922.** Where a petition alleged that while plaintiff, about to leave defendant's street car, was standing on the rear step, defendant negligently caused the step to be raised and the rear doors of the car to be closed, causing her to fall, and as another element of negligence that defendant closed the doors of the car, caught her clothing, and negligently caused the car to proceed, dragging her, defendant cannot complain of an instruction not submitting the element of dragging, which was not necessary to make plaintiff's case; the evidence showing that the injuries resulted alone from the fall.—*McDermott v. United Rys. Co. of St. Louis*, 236 S.W. 1080.

**App. 1922.** A petition alleging as grounds for negligence of defendant street railway, "Said car, because of the carelessness and negligence of the defendant, \* \* \* suddenly started down said grade between the last aforesaid streets with sudden and furious momentum, and the plaintiff, believing said car would jump the track or run into something on the track while thus running, and it being apparent to her that she was in imminent peril of life and limb, and being advised and assisted by the conductor in charge of said car, left said car while thus moving," and received injury, only charged negligence in permitting the car to run down the hill at a high rate of speed, and an instruction warranting recovery for negligence of conductor in advising plaintiff to jump from the car was too broad, and unwarranted.—*Hellar v. Kansas City Rys. Co.*, 237 S.W. 811.

In action by passenger for injuries received when jumping from a street car beyond control, an instruction permitting recovery if conductor advised plaintiff to jump was erroneous where it did not require the jury to find that plaintiff alighted relying on such advice; there being some evidence that plaintiff acted upon her own initiative.—*Id.*

**App. 1923.** In an action against a street railroad for injuries sustained by an alighting passenger at a crossing, an instruction requiring the jury to find that large numbers of people customarily used the crossing at the time of the accident and for a long time prior thereto, as a condition of finding for plaintiff, held to sufficiently restrict the jury to the facts shown in the evidence.—*Brooks v. Union Depot Bridge & Terminal R. Co.*, 258 S.W. 724. 215 Mo. App. 643.

**App. 1926.** Submission of case for negligence of carrier on theory of prematurely

starting train while passenger was boarding it held not error, notwithstanding averments of petition as to violence and extraordinary manner of starting train.—*Stephens v. Mobile & O. R. Co.*, 285 S.W. 151.

In action for injuries to passenger, predicated on premature start of train, refusal of instruction submitting defendant's theory of accidental injury held proper.—*Id.*

**App. 1927.** Refusal of instruction on accidental injury held not error, where prima facie case of negligence presented was not rebutted.—*Thomas v. St. Louis-San Francisco Ry. Co.*, 293 S.W. 1051.

**App. 1927.** Instruction on theory that street car was operated at negligent rate of speed held not error.—*Myerson v. People's Motorbus Co. of St. Louis*, 297 S.W. 455.

### ←322. — Verdict and findings.

**App. 1915.** Proof that the prior starting of a car contributed to the injury held not to preclude a finding that the violent stopping of the car was the final proximate cause, without which the injury would not have occurred.—*Allen v. Dunham*, 175 S.W. 135, 188 Mo. App. 193.

**App. 1920.** The finding against plaintiff passenger on the first count of her petition against defendant street railway seeking damages for injuries when a car door closed on her wrist concluded the question of defendant street railway's liability as to the cause of action counted on.—*Carney v. United Rys. Co. of St. Louis*, 226 S.W. 308, 205 Mo. App. 495.

Finding against plaintiff passenger on the first count of her petition against defendant street railway seeking damages for injuries when a car door closed on her wrist did not conclusively establish the fact that plaintiff passenger received no blow whatever by the closing of the door, so that she was not dazed when she alighted to the street, and unable momentarily to extricate herself from danger from the swing of the rear end of the car, which struck her and inflicted the injuries for which she seeks recovery in the second count.—*Id.*

### (E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

### ←323. Application of the doctrine to carriers in general.

**Sup. 1890.** While carriers of passengers are held to a very high degree of care, there is

a corresponding obligation on the part of a passenger to act with prudence, and, if his negligence contributes to bringing about his injury, he cannot recover.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.W. 804, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541, rehearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

**Sup. 1900.** In an action against a street-railway company for injuries, it is error to instruct that, if plaintiff was riding on the footboard of a grip car while it was running at its usual speed, he was guilty of contributory negligence unless he was a passenger, since his status as a passenger could not affect the question of his negligence.—*Raming v. Metropolitan St. Ry. Co.*, 57 S.W. 268, 157 Mo. 477.

**Sup. 1903.** A street railway passenger never assumes the risk of the company's negligence.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

**Sup. 1927.** Negligence of intending passenger in personal injury suit is not available as defense unless it contributed to injury.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

**App. 1904.** The rule imposing on carriers of passengers the highest degree of care is applicable to an injury in the production of which the passenger is a factor.—*McKinstry v. St. Louis Transit Co.*, 82 S.W. 1108, 108 Mo. App. 12.

**App. 1908.** A passenger on a freight train could assume that a coupling of cars of the train would be made without negligence.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

Though negligent toward a passenger, a railway company is not liable for resulting injury if his failure to use ordinary care contributed to the injury.—*Id.*

324. **Statutory provisions.**  
*See explanation, page iii.*

325. **Care required of passengers in general.**

A passenger is required to exercise only ordinary care for his safety.

—**Sup. 1903.** *Becker v. Lincoln Real Estate & Building Co.*, 73 S.W. 581, 174 Mo. 246;

**App. 1908.** *Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143; (1909) *Martin v. Missouri Pac. Ry. Co.*, 119 S.W. 444, 137 Mo. App. 694.

**Sup. 1886.** The discomforts and dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers.—*Harris v. Hannibal & St. J. R. Co.*, 1 S.W. 325, 80 Mo. 233, 58 Am. Rep. 111.

**Sup. 1886.** In an action by a woman in good health, 65 years old and weighing 170 pounds, to recover damages for personal injuries occasioned by the starting of a train while she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether she exercised ordinary care and diligence at the time of the accident.—*Hickman v. Missouri Pac. Ry. Co.*, 4 S.W. 127, 91 Mo. 433.

**App. 1883.** Whether a passenger on a railroad train had been guilty of contributory negligence. See *Condy v. St. Louis, I. M. & S. Ry. Co.*, 13 Mo. App. 588, memorandum.

326. **Care required of children and others under disability.**

Instructions, see post, 348.

**Sup. 1886.** In alighting from a street car, a child of 8 years old can only be held to a reasonable degree of care according to her years.—*Muehlhausen v. St. Louis R. Co.*, 2 S.W. 315, 91 Mo. 332.

**App. 1891.** Negligence cannot ordinarily be imputed to a child of the age of six years, injured while dismounting from a street car.—*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

327. **Awaiting and seeking transportation.**

Questions for jury, see post, 347.

**Sup. 1893.** Persons going to and from trains must know that depots are more or less crowded on such occasions, and should at such times and places look where they are stepping and be observant of what is going on around them.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

Where the negligence counted on by plaintiff is a failure to properly light the platform and in permitting mail bags to be thrown on it, and the defendant relies on contributory negligence, it was not proper to instruct that it was not the plaintiff's duty to expect and anticipate obstruction on the platform, that she had the right to believe the platform was safe and free of obstructions, and that if she

did not discover the mail bags, and the officers and servants failed to warn her of such obstructions, then she was not guilty of negligence.—Id.

**Sup. 1919.** That one struck by a train while crossing tracks on station premises was an invitee and had gone there for the purpose of taking a train did not relieve him from the necessity of exercising ordinary care.—*State ex rel. Peters v. Reynolds*, 214 S.W. 121.

**Sup. 1921.** Where decedent was awaiting the arrival of an accommodation train at a suburban station, and perceived a train rapidly approaching, it was her duty to see just where the moving engine was, and the rate of its speed, before attempting to cross the track directly in front of it.—*State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds*, 233 S.W. 219, 289 Mo. 479, quashing judgment and opinion (App.) *Martin v. St. Louis-San Francisco Ry. Co.*, 227 S.W. 129.

**Sup. 1925.** Prospective passenger has right to expect that car will have headlight, that warning signal will be given, and that car will stop at platform.—*Willi v. United Rys. Co. of St. Louis*, 274 S.W. 24.

Prospective passenger required to exercise ordinary care in watching for approaching car.—Id.

**Sup. 1927.** Intending passenger was entitled to presume car would be operated with ordinary care and would stop on signal.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

**App. 1881.** Passengers have a right to assume that the grounds adjacent to the cars belonging to the company within the limits in which passengers naturally go to and from the train are in a condition to be safe for ordinary transit, even on a dark night.—*Chance v. St. Louis, I. M. & S. Ry. Co.*, 10 Mo. App. 351.

**App. 1894.** It is the duty of a passenger or intending passenger, while waiting for the arrival of the train at a depot, to occupy the premises provided for passengers, and in going to and from the station platforms and trains to use the ways and means provided for that purpose.—*Gunderman v. Missouri, K. & T. Ry. Co.*, 58 Mo. App. 370.

Where a carrier of passengers maintained a convenient and safe passenger platform and comfortable waiting rooms at a depot, an intending passenger, injured by reason of falling into an excavation under a

platform erected for the freight traffic, cannot recover for the injury sustained; he having knowledge that the latter platform was used exclusively for the freight business.—Id.

An intending passenger, waiting for a train at a depot, who left the comfortable waiting rooms and well-lighted passenger platform and went into the darkness on the company's freight platform, without giving heed to existing conditions patent to his senses and sufficient to have warned an ordinarily prudent man of the probable danger of proceeding further, was guilty of contributory negligence, precluding a recovery for injuries sustained by reason of an excavation under the freight platform.—Id.

**App. 1894.** Where it is shown by the proof that an entire platform was in actual use as one continuous platform for the accommodation of defendant's passengers in entering and alighting from its trains, passengers will not be held to a knowledge that it was the secret intention of the railroad company that portions of the platform were for use in handling freight, baggage, and express matter.—*Waller v. Missouri, K. & T. Ry. Co.*, 59 Mo. App. 410.

**App. 1909.** Where, though plaintiff knew that the tracks where he attempted to board a street car ran close together so that the bumpers of passing cars sometimes touched, he also knew that it was defendant's practice to avoid having cars pass at that point, and the place where he attempted to board the car was provided by defendant for taking on passengers, he could assume that there was no danger from passing cars on the other track and was not bound to watch a car on the other track on the other side of the cross-street to see if it was going to pass the car he was boarding.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131, 138 Mo. App. 196.

**App. 1911.** A passenger has no right to enter a private telegraph office in a station without invitation.—*Roberts v. Wabash R. Co.*, 134 S.W. 89, 153 Mo. App. 638.

**App. 1914.** Where decedent, desiring to board a train, crossed a track on which it was standing, and passed onto an adjoining track, where he was immediately struck and killed by another train, which he could have seen had he looked before going onto the track, he was guilty of contributory negligence as a matter of law.—*Burnham v. Chicago, B. & Q. R. Co.*, 162 S.W. 300, 175 Mo. App. 286.

**App. 1914.** A passenger who, not familiar with a railroad station, walked around

the platform in the dark looking for the toilet room, was guilty of contributory negligence precluding recovery for injuries caused in a fall from such platform.—*Hickman v. Missouri, K. & T. Ry. Co.*, 167 S.W. 1178, 180 Mo. App. 481.

**App. 1918.** Decedent, though an invitee on railroad station premises, negligently contributed to his death, where, after he got into clearing between two station buildings, and before passing onto main track, he did not look for approaching train, the headlight of which was visible.—*Peters v. Lusk*, 206 S.W. 250, 200 Mo. App. 372.

**App. 1920.** A man who in daylight entered upon railroad track immediately in front of a locomotive, with nothing to obstruct his view, *held* as a matter of law contributorily negligent.—*Branstetter v. Chicago & A. R. Co.*, 225 S.W. 1035.

328. **Entering conveyance.**

Instructions, see post, 348.

Questions for jury, see post, 347.

328 (1). **In general.**

**Sup. 1909.** Where a street car stops for a reasonable time for passengers and gives the signal to start before one attempts to enter, the invitation to enter ceases, and one thereafter attempting to enter would be negligent, especially if he heard and understood the signal.—*Quinn v. Metropolitan St. Ry. Co.*, 118 S.W. 46, 218 Mo. 545.

**Sup. 1920.** A passenger intending to board train at station platform is required to use reasonable diligence in boarding train.—*May v. Chicago, B. & Q. R. Co.*, 225 S.W. 660, 284 Mo. 508.

**App. 1878.** Negligence of passenger in boarding street car. See *Schreiner v. St. Louis R. Co.*, 5 Mo. App. 596, memorandum.

**App. 1904.** In an action against a street railway for injuries to a passenger caused by a sudden jerk of the car, where there was no evidence to show that a reasonable time was allowed plaintiff to reach a place of safety after boarding the car before the same was started, she could not be held guilty of contributory negligence.—*Stoddard v. St. Louis & M. R. Co.*, 80 S.W. 33, 105 Mo. App. 512.

**App. 1904.** That a street car was not carrying passengers, but was proceeding to a shed for the night, did not make a person attempting to board it guilty of contributory negligence, unless he knew, or by ordinary

care could have known, that the car was not carrying passengers.—*Leu v. St. Louis Transit Co.*, 80 S.W. 273, 106 Mo. App. 329.

**App. 1906.** A passenger, injured by the starting of a street car while boarding it, was not guilty of contributory negligence in boarding by the side away from the curb, where the car was an open one with a running board on either side.—*Costello v. St. Louis Transit Co.*, 96 S.W. 425, 119 Mo. App. 391.

**App. 1909.** A passenger who steps on a train when it is apparent that a coach is about to be shoved against it with dangerous violence is guilty of contributory negligence.—*Wise v. Wabash R. Co.*, 115 S.W. 452, 135 Mo. App. 230.

**App. 1909.** Where, though plaintiff knew that tracks ran close together, he also knew that it was defendant's practice to avoid having cars pass at that point, and place where he attempted to board car was provided by defendant for taking on passengers, he was not bound to watch car on other track on other side of cross-street to see if it was going to pass car he was boarding.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131. See Carriers, 327 in this Digest.

**App. 1914.** Where decedent, desiring to board train, passed onto an adjoining track, where he was immediately struck and killed by another train, he was guilty of contributory negligence as matter of law.—*Burnham v. Chicago, B. & Q. R. Co.*, 162 S.W. 300. See Carriers, 327 in this Digest.

**App. 1915.** That person, who had just boarded caboose of freight train, was standing on platform, when thrown therefrom by unusual jerk, *held* not to make her negligent, as a matter of law.—*Lindsay v. St. Louis & H. Ry. Co.*, 178 S.W. 276.

**App. 1919.** Where plaintiff passenger was injured by the sudden starting of defendant's street railways company's car which she was boarding, caused to lose her balance, and was dragged and thrown upon the pavement, *held* that plaintiff was not negligent because she held to the upright rod or stanchion instead of letting go at once.—*Baldwin v. Kansas City Rys. Co.*, 214 S.W. 274.

328 (2). **At place other than station or platform.**

**App. 1905.** Defendant having placed the car on an unobstructed walk, leading directly to the steps, plaintiff, in choosing another way, was guilty of contributory negligence,

precluding recovery.—*Archer v. Union Pac. R. Co.*, 85 S.W. 934, 110 Mo. App. 349.

**App. 1906.** A passenger voluntarily leaving the train at a station, knowing that it would pull down to another platform, *held*, under the circumstances, guilty of negligence precluding a recovery for injuries sustained in attempting to regain the train.—*Laub v. Chicago, B. & Q. Ry. Co.*, 94 S.W. 550, 118 Mo. App. 488.

**App. 1913.** A shipper of live stock who accompanies the stock may rely on the directions of the conductor and station agent as to where the caboose will be, and that it cannot be boarded at the station.—*Chorn v. Missouri, K. & T. Ry. Co.*, 153 S.W. 1060, 168 Mo. App. 518.

**App. 1919.** Where a street car is temporarily stopped at a place other than a regular stopping place, and not to receive or discharge passengers, if one attempts to get on or off and is injured by the starting of the car the company cannot be charged with negligence, unless the conductor or motorman knew, or had reason to know, that an attempt to get on or off was being made.—*Elliott v. United Rys. Co. of St. Louis*, 214 S.W. 234, 201 Mo. App. 602.

#### ←328(3). Boarding moving car.

**Sup. 1895.** A person attempting to board an electric street railway car while in motion assumes the risks of injury only from the ordinary movements of the car.—*Schepers v. Union Depot R. Co.*, 29 S.W. 712, 126 Mo. 665.

**Sup. 1896.** Whether or not deceased, who was a boy 14 years of age, was guilty of contributory negligence in trying to board a street car while in motion, depended to some extent on his experience, intelligence, and the rate of speed at which the car was then moving, and he was not wholly absolved from the exercise of care in boarding the car while it was moving at a rate of speed of from three to seven miles per hour.—*Sly v. Union Depot Ry. Co.*, 36 S.W. 235, 134 Mo. 681.

**App. 1891.** It is contributory negligence for one to attempt to board a train moving at a speed from six to eight miles an hour.—*Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

It is not contributory negligence as a matter of law for one to attempt to board a train moving at the rate of four miles an hour.—*Id.*

**App. 1892.** In an action against a railroad company for personal injuries, it appeared that plaintiff was a passenger on a freight train and dismounted at a station to purchase a ticket; the caboose being stopped at some distance from the station. After purchasing the ticket and remaining in the station building for some five minutes, plaintiff started to board the train, but found that at this time the caboose was not at the station platform, and in attempting to catch hold of it as it went past plaintiff slipped and was injured. There was uncontradicted evidence that the caboose did in fact stop at the platform a sufficient length of time to allow passengers to get off and on. *Held*, that the railroad company discharged its full duty and was not liable.—*Hays v. Wabash Ry. Co.*, 51 Mo. App. 438.

**App. 1896.** Where plaintiff was standing on the platform at a railroad station and a train was approaching the platform at a speed of from six to seven miles per hour, the speed constantly increasing, and the conductor called to him to jump on, and he jumped on the impulse of the moment, doing so in a direction opposite to that in which the train was moving, he was guilty of contributory negligence.—*Heaton v. Kansas City, P. & G. R. Co.*, 65 Mo. App. 479.

**App. 1904.** A passenger's attempting to board a moving train is not negligence per se.—*McKee v. St. Louis Transit Co.*, 83 S.W. 1013, 108 Mo. App. 470.

**App. 1905.** For one to board a moving street car is not necessarily such negligence as will bar a recovery for an injury caused by the acceleration of the speed of the car while he was in the act of boarding it, but whether there is negligence depends on the circumstances.—*Schmitt v. St. Louis Transit Co.*, 90 S.W. 421, 115 Mo. App. 445.

**App. 1910.** A passenger attempting to board a moving train is generally guilty of contributory negligence, precluding a recovery for the injuries received, though the carrier was guilty in the first place in not stopping its train a reasonable time for the passenger to enter it in safety.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

**App. 1911.** One attempting to board moving car which had started to run over viaduct used exclusively for street car traffic is as matter of law negligent.—*Mathews v. Metropolitan St. Ry. Co.*, 137 S.W. 1003. See Carriers, ←347(5) in this Digest.

**App. 1912.** Where a person who had frequently boarded a moving street car was asked by the motorman to board a car while moving, there was an invitation to him to board the car.—*Fults v. Metropolitan St. Ry. Co.*, 148 S.W. 210, 164 Mo. App. 101.

**App. 1914.** One who attempted at elevated station to board moving car held guilty of contributory negligence as matter of law, where step of car was within a few feet of guard rail at end of platform, at which point company maintained a sign warning against boarding moving cars.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864. See Carriers, 347(5) in this Digest.

**329. In transit.**

Instructions, see post, 348.

**330. — Conduct in general.**

**Sup. 1867.** Where a passenger, while riding on defendants' railroad, had his arm broken, and became permanently disabled, by the train's coming in contact with a wrecked train of freight cars which the railroad company had negligently suffered to remain upon the side of the track, the fact that at the time of the accident he was sitting in one of the cars with his elbow on the window sill, and resting his head on his arm, has no tendency to show contributory negligence.—*Winters v. Hannibal & St. J. R. Co.*, 39 Mo. 468.

**Sup. 1907.** Where plaintiff boarded a crowded street car, and was permitted to take a seat in a box on the front platform, being unaware that an electrical explosion might occur in close proximity to her, she was not guilty of contributory negligence barring recovery for injury received in leaping from the car when an explosion occurred.—*Williamson v. St. Louis Transit Co.*, 100 S.W. 1072, 202 Mo. 345.

**App. 1905.** One who travels on a freight train assumes the risks incident thereto from jerks or jolts accompanying the movement of such trains, and is required to exercise a higher degree of care than when traveling on a passenger train.—(1904) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, affirmed 88 S.W. 767, 113 Mo. App. 636.

**App. 1910.** That passenger in leaving baggage coach and closing door by taking hold of door knob did not look to see if there would be danger of mashing his finger, did not charge him with contributory negligence.—*Creason v. St. Louis, I. M. & S. Ry. Co.*, 130 S.W. 445. See Carriers, 337 in this Digest

**App. 1913.** Where a passenger, ordered by the porter to remain in the smoking car, remained without protest, and no one knew that the smoke was making him sick, he could not recover.—*Russell v. St. Louis & S. F. R. Co.*, 161 S.W. 638. See Carriers, 336 in this Digest.

**App. 1928.** Provision of cattle caretaker's contract requiring carrying lantern did not apply where he was injured while walking along train.—*Edmondson v. Missouri Pac. R. Co.*, 8 S.W.(2d) 103.

**331. — Dangerous position.**

Duty of carrier as to management of conveyance, see ante, 295.

Preparatory to leaving conveyance, see post, 333.

Proximate cause, see post, 339.

Questions for jury, see post, 347.

**331 (1). In general.**

**Sup. 1880.** Where a railroad company did not conspicuously post the notice prohibiting passengers from riding elsewhere than in the caboose, as required by the statute providing that in case a passenger shall be injured while on the platform of a car, or in any baggage, wood, or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars then in the train, the company shall not be liable. It was liable for an injury sustained to one riding on a freight car.—*Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423.

**Sup. 1891.** Where a passenger, without the consent of the carrier, selects a place to ride which is obviously not intended for that purpose, and is hurt by reason of hazards peculiar to that position, he has no cause of action.—*Carroll v. Interstate Rapid Transit Co.*, 17 S.W. 889, 107 Mo. 653.

**Sup. 1903.** Neither on general principles, nor under Rev. St. 1899, § 1080, providing that if a railroad passenger shall be injured while on the platform, or in any baggage, wood, or freight car, in violation of printed regulations posted inside of the passenger cars, the company shall not be liable if at the time it furnished room inside its passenger cars sufficient for passengers, is a passenger justified in taking a position, on account of the crowded condition of the passenger car, on the top of a freight car, holding on to a brake with his legs dangling over the end of the car.—*Chaney v. Louisiana & M. R. R. Co.*, 75 S.W. 595, 176 Mo. 598.

**App. 1901.** The fact that persons are permitted by the conductors of a street railway company to ride on the bumpers when the cars are crowded, and that they are recognized and treated as passengers, is an invitation to the public to take that position on their cars when no other is available, and a person taking such position takes upon himself only such risk as is reasonably apparent. He does not assume the risk of being struck by a car coming up from the rear, or of being compelled to jump off to avoid a collision.—*Piquin v. St. Louis & S. Ry. Co.*, 90 Mo. App. 118.

**App. 1902.** Where plaintiff, while riding as a passenger in a caboose on a freight train, laid down on one of the seats along the side of the car, with his head toward the engine, and in such a position that it was probable he would be bumped against the framework of the seat, or thrown off the seat, by the usual violent jolting incident to the stopping and starting of such train, and was asleep when he was so injured, he was not entitled to recovery.—*Erwin v. Kansas, Ft. S. & M. Ry. Co.*, 68 S.W. 88, 94 Mo. App. 289.

**App. 1904** Negligence cannot legally be inferred from the act of a passenger in riding on a platform or footboard of a street car when a seat can be obtained, or from his temporary use of such footboard to reseat himself.—*Kreimelmann v. Jourdan*, 80 S.W. 323, 107 Mo. App. 64.

**App. 1909.** Plaintiff having voluntarily placed himself in a place of danger, as the result showed, he was negligent, though he may not have anticipated danger.—*Fusselman v. Wabash R. Co.*, 122 S.W. 1137, 139 Mo. App. 198.

**App. 1910.** In an action for death of a passenger who fell through the door of an open vestibule on the car in which he was riding, the mere fact that the danger was apparent or that he knew of it is not of itself sufficient to authorize a verdict for defendant on the score of contributory negligence, unless he omitted to conduct himself with that degree of care usually exercised by an ordinarily prudent person in the same circumstances.—*Johnston v. St. Louis & S. F. R. Co.*, 130 S.W. 413, 150 Mo. App. 304.

**App. 1912.** A street car passenger riding on a bumper *held* not to assume the negligence of the carrier.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, 143 S.W. 865, 161 Mo. App. 515.

—331(2). Standing in car.

**Sup. 1886.** Where a passenger, riding in the caboose of a railroad train, knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, but without thinking about the approaching of the cars, and without paying any attention to whether the cars were approaching, left his seat and stood up in the car and was thrown down and injured, when he would not have been had he kept his seat or resumed it before the cars struck, he was guilty of such contributory negligence as barred his recovery against the railroad for the injuries.—*Harris v. Hannibal & St. J. R. Co.*, 1 S.W. 325, 89 Mo. 233, 58 Am. Rep. 111.

**App. 1900.** Carriers of passengers, even on freight trains, are not exonerated from negligence by the mere fact that the passenger was standing when he was injured.—*Fulleton v. St. Louis, I. M. & S. Ry. Co.*, 84 Mo. App. 498.

**App. 1909.** An experienced traveler was chargeable with knowledge of the danger of standing in the aisle of a coach in a mixed train while the engine was switching, so as to prevent recovery for injuries received from a collision of the cars while in such position, whether or not warning signs were posted in the coach.—*Gabriel v. St. Louis, I. M. & S. Ry. Co.*, 115 S.W. 3, 135 Mo. App. 222.

**App. 1910.** Where the caboose of a freight train carrying passengers was so full when plaintiff boarded it that plaintiff could not get a seat, he was not negligent merely because he stood in the aisle.—*Tickell v. St. Louis, I. M. & S. Ry. Co.*, 129 S.W. 727, 149 Mo. App. 648.

**App. 1918.** A street car passenger was not negligent as a matter of law simply because she did not seat herself at the very first opportunity, but passed to a seat more distant from the door.—*Shafer v. Kansas City Rys. Co.*, 201 S.W. 611.

—331(3). Person accompanying live stock.

**Sup. 1884.** In an action against a railroad company for the death of a person killed by falling from the top of a box car, where he was riding while in charge of stock, evi-



dence that it was the custom of the railroad company to require passengers in charge of stock to ride on the top of the cars at the place where plaintiff's intestate was killed was competent to show absence of contributory negligence.—*Tibby v. Missouri Pac. Ry. Co.*, 82 Mo. 292.

**Sup. 1900.** Deceased was assisting in a shipment of cattle, and when the train was taken charge of by defendant the caboose was taken off, compelling deceased and others to ride on top of the cars. It was early in the morning, and quite dark, and as the train entered the stock yards it slowed up, to allow the conductor to enter the office and get orders. Almost immediately after the conductor signaled to go ahead deceased fell from the train while attempting to walk from one car to another. The train was running very slowly and smoothly, and there was no unusual jolt or jerk. *Held*, that deceased assumed the risk in stepping from one car to the other.—*Neville v. St. Louis M. B. T. Ry. Co.*, 50 S.W. 123, 158 Mo. 293.

**Sup. 1903.** Whether one accompanying live stock had a right to ride in the car with the stock while the train was in motion was immaterial, where the injury to him occurred while he was in the car when it was standing still on the track.—*Bolton v. Missouri Pac. Ry. Co.*, 72 S.W. 530, 172 Mo. 92.

**Sup. 1915.** Contract for shipment of live stock, *held* not to authorize recovery for accident to caretaker while riding in stock car, contrary to provisions of contract.—*Rawlings v. St. Louis, & S. F. R. Co.*, 175 S.W. 935. See Carriers, 334 in this Digest.

**Sup. 1923.** Where plaintiff's contract of shipment of household goods, implements, and horses contemplated that he ride in the caboose, but instead he rode in the emigrant car, and was injured from being struck by a horse when the car suddenly stopped while being spotted at a stockyard, *held* that he was guilty of contributory negligence precluding recovery unless the facts came within the humanitarian doctrine.—*State ex rel. Vulgamott v. Trimble*, 253 S.W. 1014, 300 Mo. 92, quashing opinion (App. 1922) *Vulgamott v. Payne*, 245 S.W. 592.

**App. 1909.** A contract with a railroad for the transportation of horses, which permitted the shipper to accompany the horses, and required him to look after and feed them, entitled him to enter the stock car at reasonable times for that purpose, but did not make the car a place for his transportation

when not caring for the horses, though it did not in terms provide where he should ride.—*Bruce v. Chicago, B. & Q. Ry. Co.*, 116 S.W. 447, 136 Mo. App. 204.

**App. 1921.** In view of Rev. St. 1919, § 9938, requiring carrier to furnish a caboose for transportation of live stock attendant, owner of live stock, who rode in freight car in which live stock was being transported, instead of in the caboose, though his contract with carrier stated that a person accompanying live stock does so at his own risk of personal injury, *held* contributorily negligent, precluding recovery for injuries sustained from sudden stop of train, causing horse in the car to be thrown against him.—*Vulgamott v. Hines*, 229 S.W. 394.

**App. 1928.** Shipper of stock, if he climbed up in car to light lantern for watering stock merely on statement of brakeman that train would be at stopping point some time, was contributorily negligent.—*Lincoln v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 460.

### 331 (4). Riding on platform.

**Sup. 1872.** As matter of law, the fact that a street-railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the company from liability for injuries there received by him.—*Burns v. Bellefontaine Ry. Co.*, 50 Mo. 139.

**Sup. 1904.** In an action against a street railroad for personal injuries received by a passenger from being struck on the arm by the brake handle while riding on the front platform of a car, the measurement of the platform showed that plaintiff had ample room to keep out of the way of the brake handle. He knew the handle was there, that the signal had been given for the car to start, and knew the brake handle would immediately begin to revolve, but placed his arm within its radius. *Held*, that plaintiff was injured through his own negligence by having placed his arm in a place of known danger.—*Brewer v. St. Louis Transit Co.*, 79 S.W. 1021, 105 Mo. App. 503.

**Sup. 1904.** A passenger riding upon the platform of a car assumes the increased risk that may result therefrom in the ordinary course of things, when the car is properly driven or managed.—*Magrane v. St. Louis & Suburban Ry. Co.*, 81 S.W. 1158, 183 Mo. 119.

**Sup. 1906.** A passenger on a street car was injured by being thrown from the car by a sudden lurch. The passenger at the time

was standing on the front platform of the car. Prior to the accident he had experienced lurches at the place of the accident, but the shock at the time of the accident was more severe. He also knew of the defective condition of the track at the place of the accident. *Held*, that the passenger did not voluntarily expose himself to danger by standing on the platform; he having a right to rely on the implied contract of safe carriage.—*Wellmeyer v. St. Louis Transit Co.*, 95 S.W. 925, 198 Mo. 527.

**Sup. 1908.** A passenger on the platform of a street car has the right to presume that the tracks and cars are properly constructed, and that there are no hidden dangers connected with their operation.—*Gage v. St. Louis Transit Co.*, 109 S.W. 13, 211 Mo. 139.

**App. 1883.** Where, in an action to recover for the negligent killing of plaintiff's intestate, it appeared that the intestate was killed while riding on defendant's street car by reason of a derrick used by a contractor near the track falling on the car, because the car caught a rope attached to the derrick, the fact that the decedent was standing on the rear platform was not evidence of contributory negligence.—*Hunt v. Missouri R. Co.*, 14 Mo. App. 160.

**App. 1886.** In the absence of any law or regulation against it, it is not negligence per se for a passenger to stand on the platform of a moving car, though there are seats inside.—*Gerstle v. Union Pac. Ry. Co.*, 23 Mo. App. 361.

**App. 1888.** A passenger, who goes on the platform of a car after his station has been announced and the train has reduced speed to stop, is not riding or remaining on the platform within the meaning of Rev. St. 1879, § 800.—*Schultze v. Missouri Pac. Ry. Co.*, 32 Mo. App. 438.

**App. 1896.** Rev. St. 1889, § 2587, provides that in case any passenger on any railroad shall be injured while on the platform, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger car, such company will not be liable for the injury, provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers. *Held*, that this section is not complied with unless the carrier furnishes a seat for each passenger, and that, where a passenger is injured while standing on the platform of a car, he is not guilty of contributory negli-

gence, and the carrier is liable, although at the time there was standing room inside of the cars.—*Choate v. Missouri Pac. Ry. Co.*, 67 Mo. App. 105.

It is not negligence per se for a passenger to ride on the platform of a car.—*Id.*

**App. 1906.** Where a street railway company adopted a rule requiring users of tobacco to occupy the rear vestibule of a car, and plaintiff was occupying such position in compliance with the rule at the time he was injured in a collision with another car, he was not guilty of contributory negligence because he was not seated in the car.—*Goodloe v. Metropolitan St. Ry. Co.*, 96 S.W. 482, 120 Mo. App. 194.

#### ←331(5). Riding on step or footboard.

**Sup. 1903.** A street car passenger taking a dangerous position by standing on the car steps, outside of the gate, and on the side of the adjacent track, on which cars run in the opposite direction, is required to exercise that degree of care for his own safety which prudent persons under like circumstances would observe.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

**App. 1904.** Where a passenger on a street car was injured while passing along the inside footboard to a seat by being struck by a car approaching on a parallel track from the opposite direction, and he had no knowledge that the tracks were so close as to render his act dangerous, his failure to look around before going onto such footboard did not constitute contributory negligence.—*Kreimelmann v. Jourdan*, 80 S.W. 323, 107 Mo. App. 64.

Where a passenger on a street car was injured while passing along the inside footboard to a seat, a requested instruction that, if plaintiff could have obtained a seat on the outside of the car, but nevertheless went on the board on the inside, and thereby contributed to the accident, he assumed the risk, and could not recover, was properly refused.—*Id.*

In an action for injuries to a passenger, while passing along the inside footboard of a street car to a seat, by being struck by a car going in the opposite direction, a requested instruction that the footboard was only intended to be used in boarding and alighting from the car was properly refused.—*Id.*

**App. 1908.** A passenger, by riding on the running board, assumes only the risks inci-

dental to that position, and not those resulting from the failure of the carrier's servants to observe due care in the management of the car.—*Vessels v. Metropolitan St. Ry. Co.*, 108 S.W. 578, 129 Mo. App. 708.

331 (6). **Limb or other part of person protruding from car.**

**Sup. 1923.** One permitting his arm to project somewhat from a street car window, receiving injuries by contact with something beside the car, is in not every instance guilty of contributory negligence barring recovery as a matter of law.—*Leister v. Wells*, 254 S.W. 75, 300 Mo. 262.

331 (7). **Riding in car not intended for passengers.**

**Sup. 1894.** Deceased, who were killed in the wreck of a train, caused by its leaving the track, were not guilty of contributory negligence by reason of sitting out on a flat car, though the conductor had told them he would rather they would go into a box car next behind, as it was more comfortable, safer, and better there.—*Berry v. Missouri Pac. Ry. Co.*, 25 S.W. 229, 124 Mo. 223.

**App. 1915.** A passenger riding in the baggage compartment of a car without objection *held* not guilty of contributory negligence.—*Anderson v. St. Louis & S. F. R. Co.*, 178 S.W. 212.

332. — **Changing position.**

**Sup. 1884.** Plaintiff, a boy 14 or 15 years of age, left his seat in a car on defendant's train while it was in motion in order to pick up a package belonging to him which had fallen from the place where he had deposited it; the car was suddenly checked and he was seriously injured. *Held*, that his action in rising from his seat was not contributory negligence, there being no rule shown which forbade passengers from standing up in cars while in motion.—*Coudy v. St. Louis, I. M. & S. Ry. Co.*, 85 Mo. 79.

**App. 1894.** A passenger in a crowded railroad car, who temporarily leaves his seat for a legitimate reason, is not thereby charged with contributory negligence, though, when he returns, the seat is occupied, and he is compelled to stand in the aisle.—*Holland v. St. Louis & S. F. R. Co.*, 79 S.W. 508, 105 Mo. App. 117.

333. **Leaving conveyance.**

Acts in emergencies, see post, 338.  
Emergency, see post, 338.  
Instructions, see post, 348.

Permission or direction of carriers, employes, see post, 336.

Questions for jury, see post, 347.

333 (1). **In general.**

**App. 1902.** An infirm passenger who fails to notify the carrier of his infirmity and does not relieve himself of a burden, though he has ample opportunity to do so before alighting from a train, and steps from a car to the platform without looking, is guilty of contributory negligence, precluding his right of recovery for injuries sustained while in the act of alighting.—*Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**App. 1915.** A street car passenger injured by the car suddenly jerking forward *held* not guilty of contributory negligence.—*Schwabenfeldt v. Metropolitan St. Ry. Co.*, 174 S.W. 143, 187 Mo. App. 588.

**App. 1919.** A crippled passenger injured by alighting from defendant's train without assistance after defendant's servants had abandoned him was not deprived of his right of recovery merely because he knew there was no portable step present at the bottom of the car steps, but nevertheless attempted to alight without assistance, providing he used ordinary care.—*Turner v. Wabash R. Co.*, 211 S.W. 101.

333 (2). **Preparing to leave conveyance before it stops.**

**Sup. 1899.** A passenger on a cable car notified the gripman of his intention to get off at a crossing, and preparatory to doing so stepped on a footboard running alongside the car on which persons getting off the car were obliged to step. The motorman failed to stop at the crossing, and stated he would let the passenger off at the next crossing, and thereupon the passenger remained standing on the footboard, though there were empty seats in the car, and, before reaching the next street, he was killed by the car colliding with a wagon on the track. *Held*, that the passenger was not guilty of contributory negligence in remaining on the footboard while the car was going to the next crossing, the position not having been voluntarily assumed by him.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

Nor was he guilty of contributory negligence in that he saw the obstruction which caused the injury on the track ahead of the car in time to have stepped back into his seat, and failed to do so, as he had a right to assume that he would be carried safely, and

that the gripman would see the obstruction in time to prevent a collision.—*Id.*

**App. 1888.** A passenger who approaches the door and platform of the car after the announcement of the station at which he intended to alight, and after the speed of the train had been lessened, but before it had stopped, and who was thrown from the platform by a sudden jerk of the train in starting up again without having stopped, was not guilty of contributory negligence in law.—*Schultze v. Missouri Pac. Ry. Co.*, 32 Mo. App. 438.

**App. 1892.** It is not contributory negligence as a matter of law for a passenger to stand by the door before the train has stopped, so as to relieve the carrier for injuries received by defects in the door.—*Mad-den v. Missouri Pac. Ry. Co.*, 50 Mo. App. 666.

**App. 1904.** It is not negligence per se for a passenger to leave his seat in a crowded car and go to the platform before the car arrives at the crossing where he intends to alight.—*Pim v. St. Louis Transit Co.*, 84 S. W. 155, 108 Mo. App. 713.

**App. 1905.** A passenger riding on a freight train, who was familiar with the operation of such trains, was guilty of contributory negligence in preparing to leave the car as soon as the train had made its first stop at his destination, and before it had come to a full stop, and without waiting a sufficient length of time to justify the inference that the stop was final.—(1904) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, affirmed 88 S.W. 767, 113 Mo. App. 636.

**App. 1911.** It is not negligence for a passenger in a street car to get up from his seat on giving a signal for a stop and go to the platform and stand on it ready to get off when the car stops.—*Holland v. Metropolitan St. Ry. Co.*, 137 S.W. 995, 157 Mo. App. 476.

**App. 1911.** Where a passenger on a street car, after signaling for a stop, went to the platform to alight when the car which was slowing down, stopped, she was not guilty of negligence for the car company permitted persons to ride on platforms and in the aisles, and for the further reason that, if passengers were not ready to alight when cars were stopped, traffic would be delayed.—*Anderson v. Metropolitan St. Ry. Co.*, 141 S.W. 461, 159 Mo. App. 449.

**App. 1916.** Where after a street car passenger had been told by conductor that she

would be let off at a street, the conductor called the street and the car slowed up, it was not negligence to arise and approach door.—*Modrell v. Dunham*, 187 S.W. 561, 564.

—333 (3). **Alighting at place other than station or platform.**

**Sup. 1893.** Where a street-railway company adopts and publishes reasonable regulations as to where its cars shall stop in taking on and letting off passengers, one who is injured by the sudden starting of the car while alighting at a point where the car has temporarily stopped to await a signal of a flagman, and not at a regular stopping point, cannot recover.—*Jackson v. Grand Ave. Ry. Co.*, 24 S.W. 192, 118 Mo. 199.

**Sup. 1905.** Though an ordinance required defendant street railway company to stop its cars on the far crossing, yet cars having frequently, to plaintiff's knowledge, been stopped at the place of the accident before reaching the far crossing, to receive or discharge passengers, and she having signaled the car to stop to let her off, she had a right to suppose, on its stopping before it reached the far crossing, that it stopped to let her off, so that, there being no suggestion that it stopped for any other purpose, defendant cannot complain that the jury were authorized to find that it was stopped for such purpose.—*Franklin v. St. Louis & M. R. R. Co.*, 87 S.W. 930, 188 Mo. 533.

**Sup. 1909.** A street car passenger carried by his station and directed to alight in a dark, strange place has the right to assume that the place is safe, in the absence of directions how to reach his destination.—*Cossett v. St. Louis & S. Ry. Co.*, 123 S.W. 569, 224 Mo. 97.

**App. 1903.** The doctrine of assumption of risk has no application to the case of a passenger injured while attempting to alight from an electric car at a dangerous place selected by the carmen, though she made no demand to have the car returned to a safe place for alighting.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

**App. 1910.** Where a conductor on a street car called out the street at which plaintiff, a passenger, intended to alight and the car immediately stopped, she had a right to assume, in the absence of warning to the contrary, that the car had stopped at such street, she being unacquainted with the neighborhood, and she was not guilty of contributory negligence in attempting to alight, though the car had not, in fact, reached plaintiff's des-

tination.—*McNally v. Metropolitan St. Ry. Co.*, 129 S.W. 464, 145 Mo. App. 127.

**App. 1911.** Where a car stops at such a point as if in obedience to her signal, a passenger may reasonably consider the act of stopping as an invitation to alight, and may reasonably assume that the operatives of the car will conduct themselves accordingly.—*Monroe v. United Rys. Co.*, 133 S.W. 645, 154 Mo. App. 39.

**App. 1912.** A passenger who has signaled the car to stop is justified in assuming that he might alight when the car did stop, notwithstanding it was in the middle of a block.—*Gardner v. Metropolitan St. Ry. Co.*, 152 S.W. 98, 167 Mo. App. 605.

←333 (4). Alighting at wrong end or part of car or on wrong side of train.

**Sup. 1908.** Where a carrier provided a place for its passengers to alight, and stopped its train there in the night after announcing the station, not having warned a passenger not to alight at the front end of the coach, that end being a usual place of exit, a passenger could assume, in the absence of knowledge of danger, that she could safely get off at that end.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

**App. 1903.** An electric car running through a country district ran past a platform provided for the exit of passengers and across a road, where it stopped to permit a passenger to alight, the conductor calling the station. There was a footboard along the side of the car, and plaintiff was permitted to alight, without assistance or remonstrance from the carmen, at a place testified by her to have been 3 or 4 feet, and by others 22 inches, below the footboard, and where the ground was uneven. *Held*, that she was not guilty of contributory negligence, though she failed to go along the footboard to the rear of the car, which was opposite a level piece of ground.—*Fillingham v. St. Louis Transit Co.*, 77 S.W. 314, 102 Mo. App. 573.

←333 (5). Alighting from moving train or car in general.

A passenger is not negligent as a matter of law in stepping from a car while it is in motion.

—**Sup. 1874.** *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; (1884) *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608; (1885) *Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50;

**App. 1887.** *Taylor v. Missouri Pac. Ry. Co.*, 26 Mo. App. 336; (1888) *Jackson v.*

*St. Louis, I. M. & S. Ry. Co.*, 29 Mo. App. 495; (1892) *Duncan v. Wyatt Park Ry. Co.*, 48 Mo. App. 659; *Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104; (1896) *Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655.

**Sup. 1881.** It is contributory negligence to attempt to alight from a moving train.—*Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185.

**Sup. 1882.** A passenger who jumped from a moving train and was struck by a train approaching on another track was guilty of contributory negligence.—*Lenix v. Missouri Pac. Ry. Co.*, 76 Mo. 86.

**Sup. 1890.** Whether a passenger jumping or stepping from a moving cable car is guilty of negligence must depend on other circumstances than the speed of the cars, and if the rate of speed is so high and the place of descent so obviously perilous that a person of ordinary prudence would not attempt to get off, the act is contributory negligence, and will bar a recovery.—*Weber v. Kansas City Cable Ry. Co.*, 12 S.W. 804, 100 Mo. 194, 7 L. R. A. 810, 18 Am. St. Rep. 541, rehearing denied 13 S.W. 587, 100 Mo. 194, 7 L. R. A. 819, 18 Am. St. Rep. 541.

A passenger on a grip car pulled the rope for a stop at a crossing, but the signal, being out of order, gave no sound; and, while the car was in full motion, without signaling the conductor or gripman, who was near him, he stepped out of a side door, which was open and unguarded, and was struck immediately by a car passing on another track. *Held*, that he was guilty of contributory negligence.—*Id.*

**Sup. 1922.** Whether passenger was negligent in not discovering that car was in motion before attempting to alight when motorman opened door *held* for the jury.—*Hibler v. Kansas City Rys. Co.*, 237 S.W. 1014.

**Sup. 1922.** Where plaintiff, a young woman 18 years of age, familiar with the movements of street cars, and in full possession of her faculties, stepped from a street car while it was running at the rate of 18 miles per hour, she was guilty of such contributory negligence as precludes a recovery where it does not appear that she was excited, or was confronted with any emergency or peril, or that her attention was diverted.—*Kirby v. United Rys. Co. of St. Louis*, 242 S. W. 79.

**App. 1892.** Whether a railway company is liable for injuries sustained by a passenger

in attempting to leave one of its trains which is in motion depends, on all the circumstances, whether it was prudent for the person to attempt to leave the train.—*Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104.

**App. 1896.** The fact that a person apprehends danger in getting off a train while in motion does not prevent a recovery for injuries received provided the train was moving slowly and plaintiff acted as a prudent person would have done under the circumstances.—*Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655.

**App. 1904.** It is not negligence per se for a passenger to alight from a moving train.—*Gress v. Missouri Pac. Ry. Co.*, 84 S.W. 122, 100 Mo. App. 716; *Hecker v. Chicago & A. Ry. Co.*, 84 S.W. 126, 110 Mo. App. 162.

**App. 1904.** Where a railroad train did not stop at a station long enough to enable passengers, acting expeditiously, to leave the train in safety, a woman 63 years of age, weighing 200 pounds, attempting to leave the train at a time when it had attained a speed of from five to six miles an hour, was guilty of contributory negligence precluding recovery for injuries sustained by her.—*Hecker v. Chicago & A. Ry. Co.*, 84 S.W. 126, 110 Mo. App. 162.

**App. 1907.** A passenger who attempts to alight from a car moving at a dangerous rate of speed and is injured, is guilty of negligence directly contributing to his injury, and cannot recover.—*Ghio v. Metropolitan St. Ry. Co.*, 103 S.W. 142, 125 Mo. App. 710.

**App. 1909.** It is contributory negligence for a female passenger to alight from a rapidly moving street car.—*Scroggins v. Metropolitan St. Ry. Co.*, 120 S.W. 731, 138 Mo. App. 215.

**App. 1910.** Generally a passenger, alighting from the conveyance of a carrier, should wait until such conveyance has come to a complete stop, or is moving so slowly as not to enhance the danger attending an attempt to alight.—*Craig v. Wabash R. Co.*, 126 S.W. 771, 142 Mo. App. 314.

**App. 1911.** A street car passenger should not attempt to alight when the car is moving, either before it has stopped, or after it has started after it has stopped.—*Parker v. United Rys. Co. of St. Louis*, 133 S.W. 187, 154 Mo. App. 126.

**App. 1918.** A passenger who does not wait for train to stop or sees that it is not

going to stop, and gets off and is injured, assumes risk of getting hurt on alighting, and can only recover where some negligent act such as a defective platform or unusual motion of train accompanies act of stepping from train.—*Rooker v. Deering Southwestern Ry. Co.*, 204 S.W. 556.

**App. 1924.** Plaintiff, who fell in alighting from a car when the motorman opened the door while the car was still moving perceptibly, and before it reached the place for passengers to alight, *held* contributorily negligent.—*Delegard v. Wells*, 258 S.W. 7.

←333 (6). **Alighting from moving car on failure to stop at station.**

If a passenger by the negligence of the agents of the carrier is carried beyond his station, he can recover for the inconvenience, loss of time, labor, and expense of traveling back; but if he leap from the train in order to avoid being carried by he does so at his own risk.

—*Sup. 1878. Nelson v. Atlantic & P. R. Co.*, 68 Mo. 503; (1879) *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604;

**App. 1900.** *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143.

**Sup. 1880.** A passenger who imprudently alights from a moving train which has failed to stop at his station cannot recover for resulting injuries.—*Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414.

**App. 1888.** A passenger on a train who proceeded to walk out of the car when the train stopped at her destination, and continued so to do although the train had started to move slowly, and was thrown from the platform by a sudden jerk of the train, was not guilty of contributory negligence as a matter of law.—*Jackson v. St. Louis, I. M. & S. Ry. Co.*, 20 Mo. App. 495.

**App. 1892.** All the circumstances of each case must be considered in determining whether in a particular case there was contributory negligence or want of ordinary care in a passenger attempting to alight from a train which failed to come to a full stop at a station where he desired to alight, and it is not sound to select an important fact which may occur in many cases and say that, being present, there must, as a matter of law, have been contributory negligence.—*Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104.

←333 (7). **Alighting from moving car on failure to stop for sufficient time.**

**Sup. 1873.** Where the train stopped at the station only a minute, and a passenger,

when the signal was given, started for the door, but, being incumbered with some bundles and her little child, and meeting incoming passengers, was delayed till her child had alighted, and the train had started, *held* that she was not barred from recovery for injuries sustained in jumping from the car to the platform by the fact that the train was in motion.—*Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509.

**App. 1892.** Where a train stopped for a very brief period at a station, but before plaintiff could get off it began to move, at which time she was in the act of moving from her seat along the aisle toward the door for the purpose of getting off, when the brakeman, seeing her, gave the signal to stop, which was done, causing the injury complained of, plaintiff was not guilty of contributory negligence as a matter of law.—*Madden v. Missouri Pac. Ry. Co.*, 50 Mo. App. 606.

**App. 1906.** A passenger on a street car is entitled to assume that the conductor will not start the car while the passenger is in the act of alighting, though he sees the conductor's arm raised toward the bell cord.—*Hurley v. Metropolitan St. Ry. Co.*, 96 S.W. 714, 120 Mo. App. 262.

Plaintiff had been riding in the vestibule of defendant's street car, which was full of people and tool boxes. The car came to a full stop at the point where plaintiff desired to alight, and as soon as the car stopped he endeavored to get to the steps as fast as he could. There were others ahead of him, whom he followed in his endeavor to alight as soon as possible, and as soon as the man ahead of him got off he stepped down, and while in the act of doing so was suddenly thrown to the street by the starting of the car. *Held*, that plaintiff exercised reasonable dispatch in endeavoring to alight.—*Id.*

**App. 1910.** A passenger attempting to alight from a moving train is generally guilty of contributory negligence precluding a recovery for the injuries received, though the carrier was guilty in the first place in not stopping its train a reasonable time for the passenger to leave it in safety.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

333 (8). Defective or unlighted platform.

**Sup. 1893.** A carrier is not liable for injuries to a passenger resulting from her falling over mail sacks thrown to the station plat-

form, from the train from which she alighted, if she did not anticipate the obstruction, and exercise due care in avoiding it.—*Sargent v. St. Louis & S. F. Ry. Co.*, 21 S.W. 823, 114 Mo. 348, 19 L. R. A. 460.

**Sup. 1894.** A passenger, in leaving a train, has the right to assume, in the absence of information to the contrary, that he can safely pass across the company's depot platform to take a conveyance to his destination.—*Fullerton v. Fordyce*, 25 S.W. 587, 121 Mo. 1, 42 Am. St. Rep. 516.

**App. 1924.** A passenger on leaving a train must use ordinary care for her own safety on the depot platform.—*Roussell v. St. Louis-San Francisco Ry. Co.*, 257 S.W. 516.

333 (9). Leaving premises by improper course.

**Sup. 1909.** A street car passenger discharged into a dark, strange place between stations, who is ignorant of the fact that he has been carried by his station, must use ordinary care for his safety in proceeding to his destination; but he is not required to walk on the right of way to the next station.—*Cossitt v. St. Louis & S. Ry. Co.*, 123 S.W. 569, 224 Mo. 97.

333 (10). Crossing other tracks.

**Sup. 1929.** One struck by street car when crossing street to change cars at intersection could assume car striking him would not start without warning at speed violating ordinance.—*Wilson v. Wells*, 13 S.W.(2d) 541.

**App. 1927.** Decedent, possessed of all faculties, walking around car and on other track without looking, *held* guilty of contributory negligence, as matter of law.—*Zlotnikoff v. Wells*, 295 S.W. 129, 220 Mo. App. 869.

334. Disobedience of rules of carrier.

**Sup. 1915.** Contract for shipment of live stock, placing responsibility for care of stock upon caretaker, *held* not to authorize recovery for accident to him while riding in the stock car, contrary to the provisions of the contract.—*Rawlings v. St. Louis & S. F. R. Co.*, 175 S.W. 935.

**App. 1914.** The public are charged with notice of conspicuous warnings maintained by a street railway company at an elevated station without proof of actual knowledge.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

⚡335. **Disregarding directions or warning of carrier's employés.**

**Sup. 1892.** An instruction is proper that, if plaintiff attempted to board the moving train after being warned by the men in charge thereof not to do so, he could not recover.—*Fulks v. St. Louis & S. F. R. Co.*, 19 S.W. 818, 111 Mo. 335.

**Sup. 1896.** While the conductor is supreme in authority on a railway train, and may by force compel a passenger to remain in the cars provided for passengers, yet, his duty to the passenger does not require him to do so. A request is sufficient; and, if unheeded, and an injury to the passenger results, the carrier is not liable therefor.—*Aufdenberg v. St. Louis, I. M. & S. Ry. Co.*, 34 S.W. 485, 132 Mo. 565.

⚡336. **Acts by permission or direction of carrier's employés.**

Admissibility of evidence, see post, ⚡345.  
Negligence of carrier, see ante, ⚡280 322.  
Questions for jury, see post, ⚡347.

**Sup. 1887.** The slowing of a train as it approached a station, the sounding of the whistle, the announcement by the brakeman of the station, the stopping of the train, the act of the conductor and brakeman in leaving the caboose with a light, and the detachment of the engine to take water, can, in an action for injuries received by a passenger, be construed in no other light than as a direction to passengers to alight, and plaintiff in the absence of anything appearing to the contrary had a right to conclude that it would be safe for him to alight at that place.—*McGee v. Missouri Pac. Ry. Co.*, 4 S.W. 739, 92 Mo. 208, 1 Am. St. Rep. 706.

**Sup. 1889.** Where a train stopped at a switch at midnight instead of the station, and the conductor told plaintiff to be quick and get off, and he did, and fell into a waterway, plaintiff's failure, by the light of a dim lantern of his own, to discover the waterway, is not evidence of contributory negligence.—*Griffith v. Missouri Pac. R. Co.*, 11 S.W. 559, 98 Mo. 168.

**Sup. 1893.** It is not negligence per se for a passenger on a street car to stand on the step of the car, outside of a gate placed between the step and the platform, at the express or implied invitation of the driver; the danger not being so obvious that it can be said that a reasonable man would disobey the invitation.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1895.** The fact that a passenger, who leaps from a moving train because of a direction from a brakeman in the car to jump, leaps from the rear of the car immediately on receiving such direction from the brakeman, and leaps in the opposite direction from which the train is moving, without first attempting to discover whether there is any real danger, does not necessarily show negligence, he being aware at the time that the train was preceded a short distance by another train.—*McPeak v. Missouri Pac. Ry. Co.*, 30 S.W. 170, 128 Mo. 617.

Where the brakeman stationed at the brake in the cupola of a caboose car, and so able to see up and down the track, on a signal for "down brakes," excitedly and recklessly calls to the passengers in the car to "jump! jump for your lives!" the company is liable for injuries to persons jumping from the moving train, though there is no real danger.—*Id.*

**Sup. 1896.** A railway passenger is himself responsible for the result of placing himself in a position of obvious peril, even if permitted or encouraged to do so by the servants of the carrier.—*Aufdenberg v. St. Louis, I. M. & S. Ry. Co.*, 34 S.W. 485, 132 Mo. 565.

**Sup. 1905.** Plaintiff, a passenger, was carried beyond her station, when the conductor directed her to step out on a flat car and she was taken back by that means. On arriving at the station, the switchman in charge assured plaintiff that there was no means of alighting except for her to jump, and assisted her to the ground. As a result of her thus alighting, plaintiff suffered a miscarriage. *Held*, that she was not guilty of contributory negligence in not informing the switchman of her condition.—*West v. St. Louis Southwestern Ry. Co.*, 86 S.W. 140, 187 Mo. 351.

**Sup. 1917.** Order, direction, or request of persons in charge of moving car for passengers to enter it may absolve such passengers from contributory negligence in so doing.—*Gunn v. United Ry. Co. of St. Louis*, 193 S.W. 814, 270 Mo. 517, L. R. A. 1917D, 1131.

**App. 1891.** It is not negligence per se for a young passenger to attempt to board a train at the invitation of the conductor.—*Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

**App. 1891.** Where a child is invited by the carrier's employés to ride on the platform, the fact that the father of the child permitted him to remain there would not defeat recovery.



ery for his injury.—*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1894.** A passenger is not negligent as a matter of law in jumping from a moving train when the brakeman shouted, "Jump for your lives," and rushed for the brake.—*Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

**App. 1895.** Where plaintiff who was riding in a box car with stock he was shipping went to the caboose to get oil for his lantern from the conductor, who directed him to come at the next stop, and in so doing, while walking along the train with one hand against the cars, he fell into a culvert and was injured, there was no contributory negligence; plaintiff merely doing what he was directed to do in a careful manner.—*Nurse v. St. Louis & S. F. Ry. Co.*, 61 Mo. App. 67.

**App. 1900.** A passenger, who in the nighttime was in danger of being carried by his station because of the failure of the carrier's servants to call out the station, by direction of a brakeman attempted to step off the train upon the station platform and was injured. *Held*, that it was within the scope of the brakeman's duty to direct the passenger to leave the train.—*Owens v. Wabash Ry. Co.*, 84 Mo. App. 143.

**App. 1905.** Though plaintiff, injured in getting off a street car, knew that the company was sinking its tracks at such place, and of the general condition of the ground there, and saw two men slip and fall in getting off the car, yet, she having then said to the conductor that he could not expect her to get off there, and he having taken hold of her arm, got down to the second step, and said "Jump this way," in doing which she slipped and fell, she cannot be held as matter of law, to have been guilty of contributory negligence.—*Senf v. St. Louis & S. Ry. Co.*, 86 S.W. 887, 112 Mo. App. 74.

**App. 1910.** A passenger on a freight train carrying his live stock who, at the request of the conductor, alighted from the caboose to assist in the saving of property endangered by a wreck of a part of the train was entitled to recover from injuries sustained in consequence of alighting from the caboose while in a dangerous position, as against the objection that he was a volunteer, as his act was that of a prudent and reasonable man justified by the conditions surrounding him and the invitation of the conductor acting within the scope of his authority.—*Austin v. St. Louis & S. F. R. Co.*, 130 S.W. 385, 149 Mo. App. 397.

**App. 1913.** Where a passenger, ordered by the porter to remain in the smoking car, remained without protest, and no one knew that the smoke was making him sick, he could not recover.—*Russell v. St. Louis & S. F. R. Co.*, 161 S.W. 638, 175 Mo. App. 457.

**App. 1916.** A passenger may rely on the the invitation of a brakeman to occupy a place on car steps preparatory to getting off when the train stops or slows at a station.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S.W. 46.

**App. 1919.** A passenger on a street car is entitled to rely on a well-established custom that the motorman will not open the doors to allow passengers to alight until the car comes to a full stop, and, where the motorman opens the doors, his act may be considered as a direction for passengers to alight then and there.—*Tillery v. Harvey*, 214 S.W. 246.

**App. 1922.** If, as claimed, a street car conductor opened the door and told a passenger to alight, while the car was moving, and while standing on the step, the car increased its speed with a sudden jerk, injuring him, the company was not exonerated because the conductor opened the door at the passenger's request.—*Leonard v. United Rys. Co. of St. Louis*, 239 S.W. 892.

### 337. Negligence as to incidental dangers.

Instructions, see post, 348.

Questions for jury, see post, 347.

**Sup. 1921.** A passenger on an interurban car having a vestibule in the center, with swinging doors communicating with back and forward compartments, was not guilty of contributory negligence, as a matter of law, in placing her hand against the door jamb and immediately behind the rear of the door to steady herself while alighting, preventing a recovery for injuries to her hand from the closing of the door.—*Anderson v. Kansas City Rys. Co.*, 233 S.W. 203.

**App. 1878.** For a passenger in a street car to expose his elbow to some extent from the window is not necessarily, and under all circumstances, negligence, but the question is to be resolved according to the facts of the particular case.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App. 1910.** That a passenger in leaving the baggage coach and closing the door by taking hold of the door knob in the usual manner did not stop and look to see if there

would be danger of mashing his finger before he proceeded to close the door did not charge him with contributory negligence.—*Creason v. St. Louis, I. M. & S. Ry. Co.*, 130 S.W. 445, 149 Mo. App. 223.

### ⚡336. Acts in emergencies.

Questions for jury, see post, ⚡347.

**Sup. 1885.** Where a person is placed in peril by the recklessness or carelessness of another who owes him a duty of safely carrying him, the propriety of an attempt to escape a reasonably apprehended danger is not to be determined by what a person of ordinary prudence and care would have done under the circumstances.—*Siegrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 424.

**Sup. 1891.** At the crossing of a horse and a steam railway, the view of the latter's track was obstructed until within 15 feet of it. A horse car was driven slowly upon the crossing, without warning from a gateman stationed at the crossing by the railroad company, until the horses were on the crossing, when, as an engine approached on a down grade, the gateman shouted to the driver of the horse car to stop, and commenced to lower the gates guarding the crossing, but, when they were halfway down, shouted to him to go on, and began raising the gates; others shouted contradictory directions to him. The driver stopped, or nearly so, but, before he had stopped, plaintiff, a passenger in the horse car, in apprehension of a collision, jumped from the car, and thereby was injured. *Held*, that the apprehension of peril was reasonable, and such jumping was not contributory negligence, though there was no real danger of a collision.—*Kleiber v. People's Ry. Co.*, 17 S.W. 946, 107 Mo. 240, 14 L. R. A. 613.

**Sup. 1899.** A passenger must have himself believed the danger to be imminent in order to obtain damages, where he attempted to escape therefrom, it appearing he would not have been injured if no attempt to escape had been made.—*Chitty v. St. Louis, I. M. & S. Ry. Co.*, 49 S.W. 868, 148 Mo. 64.

The liability of a railroad company, where a passenger jumped from one of its cars when a collision seemed imminent, is to be measured by what a prudent person would have done under like circumstances.—*Id.*

**Sup. 1899.** A passenger confronted with sudden danger while on a car is not guilty of contributory negligence merely because he fails to exercise what might have seemed to

others the best judgment in trying to avoid the danger.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

**Sup. 1907.** An action will lie against a street railway company for injury caused plaintiff in leaping from a car in which an electrical explosion had occurred, flames issuing in the part of the car where she was, where such explosions were of frequent occurrence and tended to excite and frighten passengers, though there was no evidence that other passengers had been excited or frightened; it being common knowledge that such explosions would tend to frighten passengers situated as she was, and it appearing that the motorman leaped from the car before plaintiff did.—*Williamson v. St. Louis Transit Co.*, 100 S.W. 1072, 202 Mo. 345.

**Sup. 1917.** Conduct of passenger in leaving street car when conductor curses whole bunch and threatens to shoot is not inexcusable; he not being required to weigh nicely chances between which he chooses.—*Hendrix v. United Rys. Co. of St. Louis*, 193 S.W. 812.

**Sup. 1918.** Street railway was liable to girl passenger who jumped from car on incline when it began to move backward only if peril or alarm was caused by negligence of railway, if apprehension of peril was reasonable, and if appearance of danger was imminent.—*Delfosse v. United Rys. Co. of St. Louis*, 201 S.W. 860.

**App. 1890.** Where plaintiff was sitting in a car when it was derailed, and the car, after it left the rails, went bouncing over the ties at the rate of eight or ten miles an hour, and plaintiff ran to the rear of the car and jumped off, a finding that plaintiff was not guilty of contributory negligence was proper.—*Dimmitt v. Hannibal & St. J. Ry. Co.*, 40 Mo. App. 654.

**App. 1894.** It cannot, as matter of law, be said that a passenger was negligent in jumping from a train without looking to see if there was danger in remaining on, when the brakeman, who was in the cupola of the caboose, cried out, in a loud voice, "Jump for your lives!" and immediately hurried to the brake; and it makes no difference that the language was not addressed to any one.—*Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

**App. 1903.** A passenger was alighting from a street car, and her left foot was on the lower step and her right foot in the air, and she had released her hold of the hand rail, when the car suddenly started, and, to

prevent being thrown on the ground, she threw herself backward in an effort to remain on the car, but missed the car, and was injured. *Held*, that the passenger was not guilty of contributory negligence.—*Brazis v. St. Louis Transit Co.*, 76 S.W. 708, 102 Mo. App. 224.

**App. 1904.** Where a street car was started before plaintiff succeeded in boarding it, whereupon the conductor seized plaintiff by the arm in an endeavor to drag him on the car, which failed, plaintiff's direction to the conductor to release him as the speed of the car increased, and after the conductor had failed to stop the car as plaintiff requested him to do, was insufficient to preclude a recovery for injuries sustained by plaintiff in falling from the car.—*Shanahan v. St. Louis Transit Co.*, 83 S.W. 783, 109 Mo. App. 228.

**App. 1906.** Where a passenger was injured by jumping from a moving street car to avoid an apparently impending collision with an obstruction on the track, it is immaterial whether the obstruction was in "plain" view or not, or whether the action of other passengers increased her alarm.—*McManus v. Metropolitan St. Ry. Co.*, 92 S.W. 176, 116 Mo. App. 110.

**App. 1911.** That a passenger in a wagonette, injured in getting out while the horses were running away, with one line broken, would not have been injured had he retained his seat, will not prevent recovery, if getting out was the act of an ordinarily prudent and careful man in the same situation and circumstances.—*White v. Brickey*, 137 S.W. 627, 156 Mo. App. 278.

**App. 1911.** An act done by a railroad passenger in the face of impending peril, caused by the company's negligence, in order to avoid injury, is not contributory negligence as a matter of law, though it in fact contributes to the injury; the rule being the same as in case of negligence accidents generally, where the peril of the injured person is created by another's fault and the injured person is rightfully where he is.—*Garrett v. Wabash R. Co.*, 139 S.W. 252, 159 Mo. App. 63.

**App. 1915.** A carrier is liable for injuries to a passenger received from instinctive acts of self-preservation, when, because of the carrier's negligence, the passenger is suddenly confronted with danger.—*Moore v. Metropolitan St. Ry. Co.*, 176 S.W. 1120, 189 Mo. App. 555.

**339. Proximate cause of injury.**  
Instructions, see post, 348.

**Sup. 1867.** In an action for damages against a horse-railway company for an injury caused to a passenger by falling from the platform of the car, and the passing of the wheel over his leg, the court instructed the jury that, "although the plaintiff was guilty of such carelessness or negligence as contributed to and brought about the injury by falling off, yet if the car was stopped, and afterwards the driver negligently, unskillfully, or recklessly started the car, and ran over the plaintiff's leg, when, but for such starting, he might have been rescued without further injury, then the company was liable for such injury." *Held* to be correct.—*McKeon v. Citizens' Ry. Co.*, 42 Mo. 79.

**Sup. 1871.** One person will not be allowed to impute a want of vigilance to another, injured by his act, as negligence, if that very want of vigilance was the consequence of an omission of duty on his own part.—*Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521.

**Sup. 1881.** When the concurring negligence of plaintiff proximately contributed to cause injury, there can be no recovery, unless the injury was the direct result of the omission of defendant to use proper care to avoid injury after becoming aware of plaintiff's danger.—*Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185.

**Sup. 1902.** A passenger jumping from a moving train and slipping on a greasy platform could not recover if his negligence directly contributed to the injury, though his negligence was only slight.—*Newcomb v. New York Cent. & H. R. R. Co.*, 69 S.W. 348, 169 Mo. 409.

**Sup. 1903.** Where a passenger in an elevator is caught in the door, and the elevator raised above the floor, and then, through the negligence of the operator, lowered in such a manner as to injure the passenger, his negligence in attempting to alight is no defense.—*Luckel v. Century Bldg. Co.*, 76 S.W. 1035, 177 Mo. 608.

**Sup. 1922.** Where a street car contained a sign inviting passengers to leave by the front exit, and plaintiff went to the rear platform to alight, though defendant did not allow her time to safely alight, and failed to close the vestibule door before starting the car according to its custom, its acts were not the proximate cause of the injury where plaintiff voluntarily alighted from the moving

car while it was running at the rate of 18 miles an hour.—*Kirby v. United Rys. Co. of St. Louis*, 242 S.W. 79.

**App. 1878.** The negligence of a passenger injured does not preclude a recovery where his negligence is but the remote condition of his injury, and the immediate and efficient cause is the recklessness and carelessness of the carrier.—*Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**App. 1885.** Under Act Jan. 16, 1860, relative to certain railroad companies, providing that such companies shall not be liable for injuries to persons occasioned by their getting on or off the cars at the front or forward end, it is no defense to a railroad that the passenger was intending to get off at the front end of the car, where such intention had nothing to do with her injury, but the sole cause of the injury was the careless handling of the brake by the driver of the car.—*Nissen v. Missouri R. Co.*, 19 Mo. App. 662.

**App. 1891.** Conceding that the father of a child six years of age is guilty of negligence in permitting the child to ride unattended on the front platform of the car with the driver, such negligence does not preclude a recovery for loss of services of the child resulting from injuries sustained by him through the subsequent negligence of the driver.—*Buck v. People's St. Ry., Electric Light & Power Co.*, 46 Mo. App. 555.

**App. 1902.** In an action against a street railway company, where there was evidence of contributory negligence sufficient to take that question to the jury, an instruction that if the injury was caused by the concurring negligence of plaintiff and defendants' agents, and the negligence of neither, without the concurrence of the negligence of the other, would have caused said injury, plaintiff is not entitled to recover, was proper.—*Hornstein v. United Rys. Co. of St. Louis*, 70 S.W. 1105, 97 Mo. App. 271.

**App. 1908.** Although a passenger may be negligent in standing on the running board of a car, if the gripman, knowing of his dangerous position, and that there is danger of his striking a wagon which the car is about to pass, takes no precautions for his safety, and he is injured, the proximate cause of the injury is the negligence of the carrier.—*Vessels v. Metropolitan St. Ry. Co.*, 108 S.W. 578, 129 Mo. App. 708.

**App. 1914.** Where plaintiff's intestate negligently boarded a moving car which was

just leaving an elevated station, and before he could get into a position of safety on the steps the jerk of an acceleration of speed threw him off and he was killed, his own contributory negligence was the proximate cause of the injury.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

**§340. Injury avoidable by care on part of carrier.**

**Sup.** In an action by a passenger against the carrier for personal injuries, though plaintiff may have been guilty of negligence, and though that negligence may have contributed to the injury, yet, if defendant could by the exercise of ordinary care and diligence have avoided the injury, plaintiff's negligence will not excuse or relieve defendant from liability.—(1867) *McKeon v. Citizens' R. Co.*, 42 Mo. 79; (1869) *Morrissey v. Wiggins' Ferry Co.*, 43 Mo. 380, 97 Am. Dec. 402.

**Sup. 1909.** Where plaintiff attempted to board a street car after being warned by the motorman not to do so, and the car could not, by the exercise of ordinary care, be stopped in less than 35 to 45 feet, defendant is not liable for injuries received by plaintiff while being dragged that distance, but would be liable only for injuries received after the car had traveled that distance.—*Graefe v. St. Louis Transit Co.*, 123 S.W. 835, 224 Mo. 232.

**Sup. 1918.** In action for personal injuries to a passenger struck by a street car when about to board it, the humanitarian doctrine held not applicable.—*McMiens v. United Rys. Co. of St. Louis*, 202 S.W. 1082, 274 Mo. 326.

**Sup. 1919.** Where deceased got off a car running on the north track and stood in the passageway between tracks while a car was approaching on the south track, and then stepped in front of it and was struck and killed, the motorman in charge of the car which struck had the right to presume that he would not leave a place of safety and thrust himself suddenly in front of the car, and an instruction to that effect, etc., was proper.—*Schall v. United Rys. Co. of St. Louis*, 212 S.W. 890.

**Sup. 1922.** Where an intending passenger stood waiting for a car at what she considered a safe distance from the track and so remained watching its approach without entering or attempting to enter on the track, and was struck by it, the carrier could not be held liable under the humanitarian rule.—*Butler v. United Rys. Co. of St. Louis*, 238 S.W. 1077, 293 Mo. 259.

The motorman of a car, approaching intending passenger standing near track waiting for it to stop, would have been justified, if he saw her, in assuming that she would move to a place of safety on the approach of the car, if she was standing too close.—*Id.*

An intending passenger who signaled a motorman to stop when a car traveling at the rate of 25 or 30 miles an hour, was only 20 feet from her, and was struck because several inches too close to the track, could not recover under the humanitarian doctrine, in view of testimony that a car going at such rate could not stop in less than 90 feet.—*Id.*

**Sup. 1923.** Where plaintiff, in violation of his contract with defendant which contemplated that he ride in the caboose, rode in an emigrant car with two other persons and his horses, which were separated from the remainder of the car by a strong partition, *held* that while plaintiff's position was not a safe place to ride, it was not so perilous as to bring it within the humanitarian doctrine; the word "peril" as used in that doctrine meaning something more than a bare possibility of an injury occurring.—*State ex rel. Vulgamott v. Trimble*, 253 S.W. 1014, 300 Mo. 92, quashing opinion (App. 1922) *Vulgamott v. Payne*, 245 S.W. 592.

**App. 1885.** Under Act Jan. 16, 1860, relative to certain railroad companies, providing that such companies shall not be liable for injuries to persons occasioned by their getting on or off the cars at the front or forward end, it is no defense to a railroad that the passenger was intending to get off at the front end of the car, where such intention had nothing to do with her injury, but the sole cause of the injury was the careless handling of the brake by the driver of the car.—*Nissen v. Missouri R. Co.*, 19 Mo. App. 662.

**App. 1904.** Plaintiff, alleging that he was injured by the sudden starting up of the car as he was getting on, may recover, notwithstanding any negligence of his in attempting to get on while it was moving, if those in charge of the car saw his situation, and thereafter started the car with the jerk.—*Elkenberry v. St. Louis Transit Co.*, 80 S. W. 360, 103 Mo. App. 442.

**App. 1905.** Plaintiff's dress was caught in the door of an elevator as the door was closed after she entered it, and, the elevator being caused to descend immediately thereafter, the operator discovered plaintiff's peril, and reversed the elevator; and, before it

could be stopped, plaintiff was injured by being caught between the elevator floor and the ceiling. *Held*, that as any negligence on plaintiff's part must have occurred, if at all, before the elevator began to descend, and the operator being charged with the duty to exercise unusual vigilance for plaintiff's safety, if by the exercise of such vigilance he could have seen that plaintiff's dress was caught in time to prevent injury to her, defendants were liable.—*Hensler v. Stix*, 88 S.W. 108, 113 Mo. App. 102.

**App. 1906.** Where, in an action against a street railway company for injuries to a passenger while attempting to board a moving car which he had signaled to stop, the evidence made out a prima facie case, which entitled him to go to the jury on the question of negligence in suddenly increasing the speed of the car, instructions on the theory that if the passenger was guilty of contributory negligence in attempting to board the car he could not recover, though the employees in charge of the car saw his perilous situation and made no effort to stop the car and avoid the injury, were erroneous, for one who negligently places himself in a position of peril does not thereby license another to negligently injure him.—*Coleman v. St. Louis Transit Co.*, 93 S.W. 920, 117 Mo. App. 123.

**App. 1907.** Where a passenger attempted to alight from a car moving at a dangerous rate of speed, the operators of the car were not obliged to make an effort to avert danger to him, unless they saw his situation in time to have done so, and they were not charged with the duty of discovering his peril; it not being reasonable to suppose that one would attempt to alight at such a time.—*Ghio v. Metropolitan St. Ry. Co.*, 103 S.W. 142, 125 Mo. App. 710.

**App. 1914.** Where decedent negligently stepped in front of one of defendant's trains when he was so close to it that there was no time to have prevented a collision, the humanitarian doctrine was inapplicable.—*Burnham v. Chicago, B. & Q. R. Co.*, 162 S.W. 300, 175 Mo. App. 286.

**App. 1922.** In case injuries to plaintiff riding in an emigrant car with his horses and other property, through negligent spotting of the car causing the horses to fall against and to break a partition in the car, where defendant's servants knew that plaintiff was riding in the car and had no means of avoiding injury, the humanitarian doctrine was applicable whether he was oblivious to his danger or

not.—*Vulgamott v. Payne*, 245 S.W. 502, opinion quashed (Sup. 1923) State ex rel. *Vulgamott v. Trimble*, 253 S.W. 1014.

**App. 1925.** Where intending passenger stepped to edge of track and waved flag to stop train, and made no effort to extricate himself from danger until it was too late, carrier could not be held liable under humanitarian rule.—*Tuck v. St. Louis-San Francisco Ry. Co.*, 268 S.W. 682, 217 Mo. App. 442.

No matter how negligently engineer of train may disregard his duty to persons in places of danger, carrier cannot be held liable under humanitarian rule, unless there was failure by train crew to use ordinary care to avoid injury after something had occurred which should convey information to them that party in danger would not extricate himself.—*Id.*

Where intended passenger stood so near track in using flag that train could not pass without hitting him, engineer had right to assume that deceased would act as ordinarily prudent man in regard to his own safety and would step out of danger before train could strike him, even though it did not slacken its speed.—*Id.*

←**341. Willful injury by carrier's employees.**

*See explanation, page iii.*

←**342. Contributory negligence as ground of defense.**

←**343. — Pleading.**

Conformity of instructions to pleadings, see post, ←348.

Negating contributory negligence in complaint, see ante, ←314(6).

**Sup. 1903.** The petition in an action by a street car passenger for injuries alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve. The answer consisted of a general denial and a plea of contributory negligence, in taking a dangerous position on the step of the platform of the car, outside of the gate, and on the side next to the other track. *Held*, that an additional plea alleging that the passenger knew, or by ordinary care might have known, the situation of the tracks, and that the danger of riding on the step was known, or by ordinary care might have been known, to the passenger, and that he assumed the risk, if intended to charge that his injuries resulted solely from his voluntary act of riding on the step, was covered by the plea of

general denial.—*Parks v. St. Louis & S. Ry. Co.*, 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

If the plea intended to allege that the passenger's negligent act of riding on the step contributed to his injury, it was covered by the plea of contributory negligence.—*Id.*

If the pleader intended to allege that the position was so dangerous that injury to the passenger could not have been avoided by the exercise of the care incumbent on the carrier, and that the danger was obvious or known to the passenger, the plea was defective for failing to so allege.—*Id.*

**Sup. 1904.** In an action against a street railroad for injuries to a passenger, received while attempting to get a seat in a car by way of a foot board, next to a car line on which cars ran in the opposite direction, one of which struck plaintiff, defendant filed a plea of contributory negligence, asserting that plaintiff unnecessarily went on the side of the car on which he was injured, that he failed to look or listen for an approaching car, and that he leaned out, when by standing erect he could have avoided injury. *Held*, that the answer meant no more than that the plaintiff did not use the appliances provided by defendant with ordinary care, and hence a contention that the plea assumed that the arrangement or plan of the car was a dangerous contrivance, admitting defendant's negligence in putting it into service, was untenable.—*Allen v. St. Louis Transit Co.*, 81 S.W. 1142, 183 Mo. 411.

**Sup. 1929.** Petition by one struck by street car while crossing street to change cars did not plead violation of humanitarian doctrine.—*Wilson v. Wells*, 13 S.W.(2d) 541.

**App. 1898.** In an action against a carrier for injury to a passenger in alighting from a moving train, the petition, and an instruction predicated thereon, put the slowing up of the train and the direction of the conductor to the plaintiff to alight therefrom as concurrent, whereas plaintiff, the only witness who testified to the direction from the conductor, said that the conductor was not in sight when he alighted, and that the direction or instruction was given to him before reaching his destination. *Held*, that this constituted a material variance on the question of contributory negligence.—*Mason v. St. Louis, I. M. & S. P. Ry. Co.*, 75 Mo. App. 1.

**App. 1912.** Answer in a street car passenger's action for personal injuries *held* to

allege contributory negligence.—*Harmon v. United Rys. Co. of St. Louis*, 143 S.W. 1114, 163 Mo. App. 442.

**App. 1922.** In action for injuries to a livestock shipper riding in switched freight car, an allegation in the petition that, while spotting the car, defendant's servants, though knowing of plaintiff's presence in the car and that he was exposed to danger in time to have avoided injuring him by the exercise of ordinary care, were so negligent in the management of the car that the live stock was thrown against him, *held* sufficient to let in evidence under the humanitarian rule.—*Vulgamott v. Payne*, 245 S.W. 592, opinion quashed *State ex rel. Vulgamott v. Trimble*, 253 S.W. 1014, 300 Mo. 92.

344. — Presumptions and burden of proof.

Instructions, see post, 348.

**Sup. 1882.** In an action against a carrier for injuries sustained by a passenger owing to defendant's alleged negligence, an instruction placing on plaintiff the burden of showing not only that he had been injured by defendant's negligence, but also that he had not been guilty of contributory negligence, was erroneous.—*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475.

**Sup. 1909.** In an action for injuries received while a passenger on an elevator, the evidence showed that plaintiff stepped into the elevator; that there was no person in the elevator to run it, and, that immediately upon her stepping in, the elevator began to descend and she was injured in attempting to get out. *Held*, that the burden of showing that contributory negligence of plaintiff caused the elevator to descend was on defendant.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**Sup. 1915.** There is a presumption that a passenger riding on the rear platform of a car, at the carrier's invitation, was in the exercise of due care.—*Hatchett v. United Rys. Co. of St. Louis*, 175 S.W. 878.

**Sup. 1918.** In action for injuries sustained by prospective passenger because of defects in approach to station platform, defendant had the burden of showing contributory negligence.—*Gurtman v. Lusk*, 208 S.W. 61.

**App. 1905.** An experienced shipper, traveling on a freight train, who was familiar with the operations of such trains, must be

presumed to have known that they do not always stop at the exact point intended, but must often be moved backwards or forwards after having stopped in order to reach the point at which the final stop is to be made.—(1904) *Young v. Missouri Pac. Ry. Co.*, 84 S.W. 175, judgment affirmed 88 S.W. 767, 113 Mo. App. 636.

**App. 1906.** A passenger on a street car was injured while attempting to alight from a car in consequence of its sudden starting. The passenger testified that the car came to a standstill at a place where cars were in the habit of stopping for the purpose of receiving and discharging passengers; that she proceeded down the steps to alight; that as she reached the lower step, and was in the act of stepping off, the car suddenly started with a jerk, throwing her to the ground. *Held* to establish a prima facie case of freedom from contributory negligence.—*Wege-schiede v. St. Louis Transit Co.*, 94 S.W. 774, 118 Mo. App. 295.

**App. 1912.** The burden of proving contributory negligence of a passenger is on the carrier.—*Harmon v. United Rys. Co. of St. Louis*, 143 S.W. 1114, 163 Mo. App. 442.

**App. 1916.** In passenger's action for injuries, carrier *held* to have burden of proving its affirmative plea of contributory negligence.—*Abernathy v. Lusk*, 182 S.W. 1049.

**App. 1917.** Passenger on train will be presumed to have been in the exercise of ordinary care, which includes presumption against suicide, when he went to rear end of train when it was in motion.—*Daly v. Pryor*, 198 S.W. 91, 197 Mo. App. 583.

While there is a presumption against contributory negligence, such presumption cannot take the place, in action for death of passenger, of affirmative proof of carrier's negligence.—*Id.*

345. — Admissibility of evidence.

**Sup. 1884.** To show that it was not contributory negligence for one accompanying stock to ride on the top of the train, evidence of the carrier's custom to so transport stockmen is admissible.—*Tibby v. Missouri Pac. Ry. Co.*, 82 Mo. 292.

**Sup. 1884.** Where a passenger was injured by attempting to alight from a moving train which had not stopped long enough at a station to permit her to alight, evidence that the brakeman called to the passenger when she was standing on the platform: "Come on.

Hurry up"—was admissible in an action against the railroad company for the injuries as a part of the res geste and as tending to rebut the defense of contributory negligence.—*Waller v. Hannibal & St. J. R. Co.*, '83 Mo. 608.

**App. 1890.** In an action by a shipper for personal injuries received while riding on defendant's train, evidence of a practice among shippers of stock not to ride all the time in a caboose, but to catch on the train at any place if the train moved before they could catch the caboose, has no bearing on the controversy where plaintiff's evidence shows that he had ample time and opportunity to get into the caboose if he had seen fit to do so.—*Tuley v. Chicago, B. & Q. Ry. Co.*, 41 Mo. App. 432.

**App. 1910.** In an action for injuries to a passenger who boarded a train at a station where there was no depot or agent, and was injured in closing the door of the baggage car, whether he had gone to make arrangements as to his baggage, testimony as to the custom and requirement of the railroad company that passengers having baggage put on at stations where there was no agents were required to go to the baggage coach to arrange about their baggage after boarding the train, and that the conductor had told witnesses to go to the baggage coach for that purpose, was admissible, the rigid rules as to proving the existence of general customs not being applicable to the situation.—*Creason v. St. Louis, I. M. & S. Ry. Co.*, 130 S.W. 445, 149 Mo. App. 223.

**App. 1915.** In an action by one injured in attempting to board defendant's street car, evidence of his intoxication at that time was admissible, but not his habitual drunkenness, unless his intoxication was denied.—*Boggs v. Harvey*, 178 S.W. 867.

**App. 1924.** In action for injuries to passenger struck by projecting roof of station building as street car passed with plaintiff and others standing on footboard, testimony that car, because of speed, rocked from side to side, *held* admissible as tending to acquit plaintiff of contributory negligence in leaning out from car.—*Van Leer v. Wells*, 263 S.W. 493.

### —346. — Sufficiency of evidence.

#### —346 (½). In general.

**Sup. 1918.** In action for injuries sustained by prospective passenger, because of defects in approach to station platform, defense of defendant railroad being that plain-

tiff was negligent in using such approach instead of another, evidence *held* to justify verdict for plaintiff.—*Gurtman v. Lusk*, 208 S. W. 61.

Evidence *held* not to show conclusively that plaintiff was negligent in not seeing a hole in the approach to station platform, or looking for it.—*Id.*

**Sup. 1927.** Attempt of intending passenger to cross track before approaching car is evidence of belief that he could do so.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

#### —346 (1). Entering conveyance.

**Sup. 1909.** Plaintiff's evidence *held* to show that the accident resulted from plaintiff's voluntary act in letting go his hold on the street car.—*Quinn v. Metropolitan St. Ry. Co.*, 118 S.W. 46, 218 Mo. 545.

**App. 1905.** Undisputed testimony, in an action for injuries incurred while attempting to board a railroad car, *held* to show that the plaintiff was mistaken in testifying that she was not thrown off her balance when the car started, so that such testimony could not be relied on to show that she was guilty of contributory negligence.—*New v. St. Louis & S. Ry. Co.*, 89 S.W. 1043, 114 Mo. App. 379.

**App. 1928.** Evidence *held* to eliminate question of contributory negligence as showing injury by premature starting of bus, not in attempt to board moving bus.—*Hayward v. People's Motorbus Co. of St. Louis*, 1 S.W. (2d) 252.

#### —346 (2). In transit.

**App. 1885.** In an action against a street-railroad company for personal injuries to a passenger who was knocked from a car while standing upon a step thereof with part of his body projecting beyond the side of the car, evidence considered, and *held* to show that plaintiff was guilty of contributory negligence.—*Ashbrook v. Frederick Ave. Ry. Co.*, 18 Mo. App. 290.

**App. 1888.** In an action by a passenger to recover damages for injuries sustained by being thrown from the platform of a caboose by a jar caused in switching freight cars against the caboose, evidence *held* to show plaintiff guilty of contributory negligence.—*Smotherman v. St. Louis, I. M. & S. Ry. Co.*, 29 Mo. App. 265.

**App. 1910.** In an action against a street railroad for death of a passenger who fell off a car, evidence *held* to show that the cause of



the mishap was deceased's negligence.—*Quisenberry v. Metropolitan St. Ry. Co.*, 126 S.W. 182, 142 Mo. App. 275.

**App. 1910.** In an action against a street railway company, where plaintiff claimed that his arm was resting on the window sill, and through a collision with a passing wagon it was jarred outside of the car and there injured, evidence *held* insufficient to show that plaintiff's arm was not outside the car when the collision occurred.—*Lange v. Metropolitan St. Ry. Co.*, 132 S.W. 31, 151 Mo. App. 500.

346 (3). Leaving conveyance.

**Sup. 1915.** In an action under a California statute for wrongful death of a caretaker of stock, caused by stepping off the caboose in the dark and falling from a trestle, evidence *held* to sustain a finding that deceased was in the exercise of due care.—*Miller v. Southern Pac. Co.*, 178 S.W. 885, 266 Mo. 19.

**Sup. 1920.** Where the only evidence of negligent operation of the car was that it was suddenly started while plaintiff was alighting, it was not error to deny recovery if the jury found he did not attempt to alight until after the car had started.—*Sivicek v. Dunham*, 219 S.W. 594.

**App. 1903.** The statement of a street car passenger, who, because of the sudden starting of an open car while he was standing between two seats, in the act of alighting, was thrown forward toward the adjoining track, in which position he was struck by a car passing on the adjoining track, that when he lost his footing he was not looking for a car on the adjoining track, but was looking where he meant to step, did not show that he meant to step onto the adjoining track without looking, and so did not show that he was guilty of contributory negligence.—*Scamell v. St. Louis Transit Co.*, 76 S.W. 660, 102 Mo. App. 198.

**App. 1909.** Evidence *held* to show that plaintiff was injured while attempting to alight from a rapidly moving car, and not by the sudden starting of the car after it had stopped.—*Scroggins v. Metropolitan St. Ry. Co.*, 120 S.W. 731, 138 Mo. App. 215.

**App. 1912.** In an action for injuries to a passenger in alighting from a car, an answer by plaintiff to a question on cross-examination *held* not to amount to an admission that she attempted to get off after the car had started.—*Hutton v. Metropolitan Street Ry. Co.*, 150 S.W. 722, 166 Mo. App. 645.

**App. 1910.** In a suit by passenger injured on alighting by sudden jerk of train, the jury were warranted in finding him free from contributory negligence, although he attempted to alight with his hands in his pocket, not grasping a handhold, where the morning was cold, and he was an experienced traveler carrying no baggage, and the train had practically stopped.—*Stakebake v. Union Pac. R. Co.*, 185 S.W. 1166.

347. — Questions for jury.

347 (1). In general.

**Sup. 1908.** In a passenger's action for injuries an instruction which recited all the substantial facts and charged that plaintiff would be guilty of contributory negligence under the facts stated, being in effect a demurrer to the evidence, was properly refused, where the question of contributory negligence was for the jury.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

**App. 1877.** Question for jury in action for injuries to a passenger as to his contributory negligence. See *Haderlein v. St. Louis R. Co.*, 3 Mo. App. 601, memorandum.

**App. 1919.** Question of negligence under the humanitarian doctrine of engineer who, while switching, ran into passenger attempting to cross track, close to which he had been walking, returning from water-closet to depot, *held* for the jury.—*Anderson v. Pryor*, 209 S.W. 122.

347 (2). Care required of or in respect to children and others under disability.

**Sup. 1890.** Whether a child nine years old has sufficient discretion to alight from a car without special attention from the conductor is a question of fact.—*Ridenhour v. Kansas City Cable Ry. Co.*, 14 S.W. 760, 102 Mo. 270; affirming judgment 13 S.W. 889, 102 Mo. 270.

The proof being that plaintiff remained inside the cable car until the conductor gave the bell signal to stop, then went out on the step waiting till the car should come to a full stop, there was no error in submitting to the jury, "under all the facts and circumstances in proof," "whether plaintiff [who was only 9 years old] had at the time sufficient capacity and discretion to understand" that the steps were a more dangerous place than the inside of the car, in connection with the instruction that to entitle plaintiff to recover they must find plaintiff "acting with reasonable care and diligence for one of his years."—*Id.*

**Sup. 1896.** In an action for the death of plaintiff's son at about the age of 14 years, it appeared that while attempting, as a passenger, to board one of defendant's cars while in motion, he was swung in front of one coupled to it, and sustained fatal injuries. At defendant's request instructions were given which required only, to free deceased from negligence, that he must have exercised that care and caution which might have been reasonably expected from one of his age, experience, and intelligence. *Held*, that they were properly given.—*Sly v. Union Depot Ry. Co.*, 38 S.W. 235, 134 Mo. 681.

**Sup. 1912.** Contributory negligence of boy in attempting to alight from moving car, about three feet from the end of a platform, over which he was carried by the momentum, *held* to be for the jury.—*Moeller v. United Rys. Co.*, 147 S.W. 1009, 242 Mo. 721.

**App. 1908.** Whether a boy 12 years old was guilty of contributory negligence while alighting from a moving car *held* under the facts for the jury.—*Moeller v. United Rys. Co. of St. Louis*, 112 S.W. 714, 133 Mo. App. 68.

**App. 1912.** Whether parents were guilty of contributory negligence preventing recovery for death of a child by falling from a passenger elevator *held* a jury question.—*Howard v. Scarritt Estate Co.*, 144 S.W. 185, 161 Mo. App. 552.

**App. 1913.** Evidence as to the physical condition, poor eyesight, etc., of a passenger, injured in alighting from a train, assistance requested and promised not having been given, and as to attending circumstances, including the fact that it was, or just previously had been, snowing, *held* to make a case for the jury on the question of contributory negligence in getting off on the wrong side.—*Layne v. Chicago & A. R. Co.*, 157 S.W. 850, 175 Mo. App. 34.

**App. 1915.** Whether boy, alighting from and running behind a north-bound street car and struck by south-bound car running at excessive speed, was negligent, *held* a question for the jury.—*Moore v. Metropolitan St. Ry. Co.*, 180 S.W. 408.

#### ←347(3). Awaiting and seeking transportation.

**Sup. 1895.** That one going to a depot walked in the space on a double-tracked railroad, between the two tracks, with an umbrella over her head, so near one of the tracks as to be struck by a train coming back of her,

does not show such negligence on her part as to justify the taking of the case from the jury, there being evidence that those in charge of the train knew that people were in the habit of walking between the tracks at that point, and that they did not use proper means to prevent the accident after they saw, or by ordinary care should have seen, her peril.—*Kreis v. Missouri Pac. R. Co.*, 33 S.W. 64, 1150, 131 Mo. 533.

**Sup. 1917.** In action against street railroad company for personal injuries received while waiting for car upon sidewalk maintained by defendant at its station, and caused by end of car which in rounding curve protruded over sidewalk an unusual distance and knocked plaintiff down, question of contributory negligence *held* for jury.—*Laurent v. United Rys. Co. of St. Louis*, 191 S.W. 992.

**Sup. 1921.** In an action for the death of one awaiting passage on a suburban train, who while crossing the track was struck by a through train running late on the time of the suburban train, *held*, that, in view of decedent's negligence and knowledge of the approaching train, and notwithstanding the humanitarian rule, plaintiff was not entitled to have the case go to the jury.—*State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds*, 233 S.W. 219, 289 Mo. 479, quashing judgment and opinion (*App.*) *Martin v. St. Louis-San Francisco Ry. Co.*, 227 S.W. 129.

**Sup. 1925.** Contributory negligence of prospective passenger, struck by car approaching without headlight and signals, *held* for jury.—*Willi v. United Rys. Co. of St. Louis*, 274 S.W. 24.

**Sup. 1925.** Intending passenger *held* not guilty of contributory negligence as matter of law.—*Unterlachner v. Wells*, 278 S.W. 79.

**Sup. 1927.** Contributory negligence of person injured when struck by street car which he intended to take *held* for jury.—*Unterlachner v. Wells*, 296 S.W. 755, 317 Mo. 181.

**Sup. 1927.** Intending passenger, struck after crossing intervening track behind car, *held* not guilty of negligence, as matter of law, under evidence that view was not obstructed.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

Negligence of intending passenger in misjudging speed of approaching car *held* question for jury.—*Id.*

Intending passenger was not negligent, as matter of law, for attempting to pass before

approaching car with reasonable belief he could do so.—*Id.*

**App. 1900.** A person approaching a railroad station from a public road to take a train proceeded across a graveled area between two roadways, crossed by semaphore wires. He had knowledge of the existence of the wires, but forgot about them, tripped on them, and was injured. *Held*, that he was not negligent as matter of law.—*Chase v. Atchison, T. & S. F. Ry. Co.*, 114 S.W. 1141, 134 Mo. App. 655.

**App. 1911.** Whether a passenger, who, while working her way through a crowd of people on a depot platform to board a train, was guilty of contributory negligence in failing to see a hole in the platform over three feet long, six inches wide, and twelve inches deep, and stepping into it, *held*, under the evidence, to be for the jury.—*Biggie v. Chicago, B. & Q. R. Co.*, 140 S.W. 602, 159 Mo. App. 350.

**App. 1914.** Where decedent, in passing to the north side of a train which he expected to board, and stepping on an adjoining track, where he was struck and killed, was following a common practice of passengers, to board the train on both sides, his act in doing so was not contributory negligence as a matter of law.—*Burnham v. Chicago, B. & Q. R. Co.*, 162 S.W. 300, 175 Mo. App. 286.

**App. 1920.** Where deceased approaching a station to board a train stepped upon a switch track immediately in front of moving locomotive, and where there was no evidence that trainmen saw deceased in his perilous position, or that train could have been stopped if they had seen him, court's refusal to submit the last clear chance doctrine *held* proper.—*Branstetter v. Chicago & A. R. Co.*, 225 S.W. 1035.

**App. 1920.** In an action for injuries to an intending passenger struck by the rear end of a street car rounding a curve and thrown into an excavation, whether plaintiff was guilty of contributory negligence which was the proximate cause of his injuries *held* for the jury.—*Flynn v. Kansas City Rys. Co.*, 226 S.W. 974.

#### 347 (4). Entering conveyance in general.

**Sup. 1895.** Defendant's passenger depot at a regular station having been burned, its trains were thereafter stopped at a public crossing, where there was no platform, and where the distance from the ground to the lowest step of the coaches was nearly three

feet. Plaintiff, while attempting to board a coach to take passage, none of defendant's servants being present to assist her, fell, and was injured. *Held*, that the questions of negligence and contributory negligence was for the jury.—*Elchhorn v. Missouri, K. & T. Ry. Co.*, 32 S.W. 993, 130 Mo. 575.

**Sup. 1917.** In action for injuries while attempting to board street car at place where it did not usually stop, whether there was definite invitation to board car under conditions reasonably safe *held*, under evidence, for jury.—*Vrooman v. Harvey*, 197 S.W. 118.

**App. 1898.** In an action against a street railroad company for injuries to a passenger while he was attempting to board a car, evidence considered, and *held* to justify submission to the jury of the issue of plaintiff's contributory negligence.—*Posch v. Southern Electric R. Co.*, 76 Mo. App. 601.

**App. 1907.** It is not negligence as matter of law for one to board a street car without special invitation to do so.—*Baskett v. Metropolitan St. Ry. Co.*, 101 S.W. 138, 123 Mo. App. 725.

**App. 1909.** Where plaintiff, who was attempting to board a street car platform which was crowded, at a point where the double tracks came close together, had not entirely gotten on the platform when he saw a car approaching on the other track some 15 or 20 feet away, plaintiff was not negligent per se in signaling the motorman to stop the other car, instead of jumping off the car he was on, if one in the exercise of ordinary care might have adopted the same course in the emergency.—*Scott v. Metropolitan St. Ry. Co.*, 120 S.W. 131, 138 Mo. App. 196.

In an action for injuries sustained while attempting to board the platform of a crowded car by being caught between the car and a passing car on another track, whether plaintiff was negligent in attempting to board the car *held* a jury question.—*Id.*

**App. 1914.** In an action by one who was thrown from a street car when he attempted to board it, the question of plaintiff's contributory negligence *held* for the jury.—*Danielson v. Metropolitan St. Ry. Co.*, 162 S.W. 307, 175 Mo. App. 314.

**App. 1920.** Where plaintiff, injured in elevator shaft on the premises of defendant, with whom he had been transacting business, walked through an open door into the shaft in a poorly lighted portion of the building,

past defendant's employé, who stood with back to opening, indicating that passengers could enter if they desired, the question whether plaintiff was contributorily negligent was for the jury.—*Grote v. Hussmann*, 223 S. W. 129, 204 Mo. App. 466.

☛347 (5). **Boarding moving conveyance.**

**Sup. 1892.** The courts will not declare, as a matter of law, a person guilty of contributory negligence who attempts to get on a train while it is moving slowly, especially at a platform.—*Fulks v. St. Louis, & S. F. R. Co.*, 19 S.W. 818, 111 Mo. 335.

An attempt to board a train in motion is not always per se contributory negligence.—*Id.*

**Sup. 1895.** It is contributory negligence, as a matter of law, to attempt to board a moving train.—*Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W. 331, 128 Mo. 64.

**Sup. 1913.** The question of the contributory negligence of a strong man of 28 years in attempting to board a car while in motion is for the jury where the evidence as to the speed of the car is conflicting.—*Nolan v. Metropolitan St. Ry. Co.*, 157 S.W. 637, 250 Mo. 602.

**App. 1900.** Where plaintiff was attempting to board a slowly moving car, the question of contributory negligence is one of mixed law and fact, and should be determined by the jury under guidance of proper instructions in the light of all the facts and circumstances disclosed by the evidence.—*Hausberger v. Sedalia Electric Ry., Light & Power Co.*, 82 Mo. App. 566.

**App. 1903.** Whether one is negligent in attempting to board a street car, slowed down for him, while it is in motion, is a question of fact, unless the speed is so great, or he is so infirm or encumbered, as to make it manifest negligence.—*O'Mara v. St. Louis Transit Co.*, 76 S.W. 680, 102 Mo. App. 202.

**App. 1904.** Whether a person attempting to board a street car moving at a slow rate of speed is guilty of contributory negligence, precluding a recovery for injuries occasioned by the sudden increase of speed, is for the jury.—*Leu v. St. Louis Transit Co.*, 80 S.W. 273, 106 Mo. App. 329.

**App. 1904.** It is not contributory negligence, as a matter of law, for an ordinarily active man, 38 years old, to attempt to board a street car turning out of a curve at a speed of 5 or 6 miles an hour; the place being the

usual place where the car stops to let passengers on and off, and he being familiar with the place.—*Eikenberry v. St. Louis Transit Co.*, 80 S.W. 360, 103 Mo. App. 442.

**App. 1904.** In an action for injuries to a passenger while attempting to board a street car by the premature starting thereof, evidence as to plaintiff's acts in attempting to board the car *held* to require a submission of the question of plaintiff's contributory negligence to the jury.—*Shanahan v. St. Louis Transit Co.*, 83 S.W. 783, 109 Mo. App. 228.

**App. 1905.** Whether plaintiff was guilty of contributory negligence in attempting to board an electric street car while it was moving rapidly, or when he ought to have known that its speed had been checked not to take on passengers, but to get past a broken circuit at a crossing, and that it was likely to recover speed immediately, so as to preclude his recovery for injuries received at the time, was a question for the jury.—*Leu v. St. Louis Transit Co.*, 85 S.W. 137, 110 Mo. App. 458.

**App. 1905.** One cannot be held, as matter of law, guilty of contributory negligence in attempting to board a moving street car; there being evidence that its speed was no greater than that of a man going at a fast walk.—*Spencer v. St. Louis Transit Co.*, 86 S.W. 593, 111 Mo. App. 653.

It is negligence, as matter of law, for one to attempt to board a street car going at a speed of 8 or 10 miles an hour.—*Id.*

**App. 1910.** The rule that a passenger attempting to board or alight from a moving train is generally guilty of contributory negligence precluding a recovery for the injuries received, though the carrier was guilty in the first place in not stopping its train a reasonable time for the passenger to enter or leave it in safety, is subject to some exceptions where the car is moving so slowly that the passenger's act may not be contributory negligence as a matter of law.—*Johnson v. St. Joseph Ry., Light, Heat & Power Co.*, 128 S.W. 243, 143 Mo. App. 376.

**App. 1911.** The rule that it is not negligence per se for a strong able-bodied man to attempt to board a slowly moving street car applies only in cases where the act is not attended by unusual and extraordinary dangers, and one attempting to board a moving car which had started to run over a viaduct used exclusively for street car traffic is as a matter of law negligent.—*Mathews v. Metro-*

politan St. Ry. Co., 137 S.W. 1003, 156 Mo. App. 715.

**App. 1911.** Where a mixed train was stopped, so that the passenger coaches were some distance from the station, and it was the custom of the road to either stop the train, in the first instance, so that the passenger coaches would be near the station, or, if they were stopped away from the station, to move them down, and then give passengers an opportunity to enter the cars, a passenger who attempted to board the train which was moving at a slow rate of speed, after he discovered that it would not stop at the station, as he had expected, was not, as a matter of law, guilty of contributory negligence.—*Le Duc v. St. Louis, I. M. & S. Ry. Co.*, 140 S. W. 758, 159 Mo. App. 136.

**App. 1912.** Whether a passenger injured while boarding a street car was guilty of contributory negligence in boarding the car while it was moving was a jury question, if the car had slowed down to receive him as a passenger and was moving so slow that it had almost or practically stopped.—*Palfrey v. United Rys. Co. of St. Louis*, 142 S.W. 773, 162 Mo. App. 470.

**App. 1914.** One who attempted at an elevated station to board a moving car, the gates of which were being drawn shut, *held* guilty of contributory negligence as a matter of law, where the step of the car was within a few feet of the guard rail at the end of the platform, at which point the company maintained a sign warning the public against boarding moving cars.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S.W. 864, 179 Mo. App. 311.

347(6). Conduct while in transit in general.

**Sup. 1889.** Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box and several flat cars. Deceased and others were riding on a flat car next the engine, to the knowledge of the conductor and brakemen, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car, but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured except those on the flat car. *Held*, that the questions of negligence,

and absence of contributory negligence, were for the jury.—*Wagner v. Missouri Pac. Ry. Co.*, 10 S.W. 486, 97 Mo. 512, 3 L. R. A. 156; *Zuendt v. Same*, 10 S.W. 491.

**Sup. 1896.** In an action against a railroad company for injuries to plaintiff from failure to heat the car, it is a question for the jury whether plaintiff was chargeable with contributory negligence because he did not leave the car at some station, made no effort to procure additional wraps from his trunk in the baggage car, took off his overcoat at one time to give his wife the benefit of its warmth, and wore inadequate clothing to meet the demands of the climate and season.—*Taylor v. Wabash R. Co.*, 38 S.W. 304, 42 L. R. A. 110.

**Sup. 1908.** It is not negligence as a matter of law for a passenger on a street car to protrude a portion of his body out of the car in which he is being carried, but such question is one of fact to be determined by the jury under proper instructions from the court, the test being whether or not an ordinarily prudent person would do the same act under the same or like circumstances.—*Gage v. St. Louis Transit Co.*, 109 S.W. 13, 211 Mo. 139.

**Sup. 1909.** In an action by a street car passenger for injuries from being struck by a beam near a track, evidence showing that he was riding with his arm protruding through a window is sufficient to take the case to the jury as to contributory negligence.—*Gardner v. Metropolitan St. Ry. Co.*, 122 S.W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.

Such an act of the passenger would not be negligence per se, preventing a recovery.—*Id.*

**Sup. 1921.** Whether a passenger injured in collision with a truck when riding on the side next to the space between the track and the curb, with his elbow protruding beyond the side, while reading a newspaper, was guilty of contributory negligence, *held* for the jury.—*Crone v. United Rys. Co. of St. Louis*, 236 S.W. 654.

**App. 1906.** Where plaintiff, a passenger on a street car, sustained a fractured elbow by its being struck by a passing car on an opposite track, plaintiff was not guilty of contributory negligence, as a matter of law, in exposing his elbow to a slight degree from the window of the car on which he was riding, or in resting the same on the window

sill within the car.—*Smith v. St. Louis Transit Co.*, 97 S.W. 218, 120 Mo. App. 328.

**App. 1908.** Whether it was negligent for a passenger on a freight train to sit on a trunk near an open side door of the caboose *held* under the evidence a jury question.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

**App. 1910.** Whether an assistant mail clerk riding in a mail car, who left a safe position in the car and went to the door in the side thereof, and put out his head to discover the cause of an unusual noise, caused by the air coupling becoming separated, and who was injured by a stone thrown into the air by the dragging hose and striking him, was guilty of contributory negligence, *held*, under the evidence, for the jury.—*Larrance v. Missouri Pac. Ry. Co.*, 125 S.W. 549, 141 Mo. App. 338.

**App. 1910.** A passenger on a street car is not negligent per se in resting his arm on the window sill, but it is for the jury whether, under the circumstances, he was guilty of contributory negligence.—*Lange v. Metropolitan St. Ry. Co.*, 132 S.W. 31, 151 Mo. App. 500.

**App. 1911.** All the seats of a passenger coach of a mixed train were occupied, and passengers were required to occupy the aisle. A female passenger stood near the end of the car, holding to the door casing to make her position secure. While coupling, the coach was jolted, and she was thrown on the floor and injured. *Held*, that she was not as a matter of law guilty of contributory negligence.—*Allison v. St. Louis & H. Ry. Co.*, 137 S.W. 896, 157 Mo. App. 72.

**App. 1916.** Passenger stumbling over grip when speed of train was suddenly checked *held* not negligent as a matter of law in walking along the aisle for a necessary purpose, though aisle was obstructed by grips.—*Abernathy v. Lusk*, 182 S.W. 1049.

**App. 1916.** That plaintiff, in an action for injuries received from sudden jerking of mixed train, unnecessarily arose from his seat and started to the door while the train was in motion is not contributory negligence as a matter of law.—*Provance v. Missouri Southern R. Co.*, 186 S.W. 955.

**App. 1922.** Where the evidence of plaintiff and the other witnesses to the accident showed that plaintiff's injury was caused by a stake on a wagon which the street car in

which she was riding was then passing being thrust in the window by her seat, and pinning her arm against the back of the seat, there was no necessity to submit the issue of contributory negligence even if there were some evidence that her arm was a little bit outside of the window just before the accident, since that position did not contribute to the injury.—*Perkins v. United Rys. Co. of St. Louis*, 243 S.W. 224.

**App. 1928.** Contributory negligence *held* for jury, in shipper's action against railroad for injuries sustained on sudden bumping of car, after alleged statement of brakeman relative to watering of stock that train would not move.—*Lincoln v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 460

#### ⚡347 (7). Riding on platform.

**Sup. 1906.** A passenger, standing on the platform of a street car, though there is room inside of the car, is not guilty of negligence as a matter of law; but the question of his negligence is for the jury.—*Wellmeyer v. St. Louis Transit Co.*, 95 S.W. 925, 198 Mo. 527.

**App. 1907.** It is not negligence as a matter of law for one to board and ride on the platform of a street car.—*Baskett v. Metropolitan St. Ry. Co.*, 101 S.W. 138, 123 Mo. App. 725.

**App. 1918.** Street car passenger is not conclusively contributorily negligent in remaining on step where car is crowded.—*Smith v. Kansas City Rys. Co.*, 204 S.W. 575. See Carriers, ⚡347(8) in this Digest.

#### ⚡347 (8). Riding on steps or footboard.

**Sup. 1891.** Plaintiff boarded an elevated steam-railway car in motion by getting on the sheetiron covering of the steps of the last platform on the train, and maintained himself in that position by holding to the iron gate that barred entrance there until struck by a structure near the track, and knocked into the street below. *Held*, that he was negligent as a matter of law.—*Carroll v. Interstate Rapid Transit Co.*, 17 S.W. 889, 107 Mo. 653.

**Sup. 1893.** Plaintiff, while riding on the step of defendant's street car, was knocked off by a derrick standing near the track, and injured. It appeared that plaintiff knew that a derrick was being used at that point for the construction of a sewer, and that defendant had moved its tracks nearer the derrick during the day. *Held*, that the question as to whether plaintiff was negligent in falling

to see the derrick was for the jury.—*Seymour v. Citizens' Ry. Co.*, 21 S.W. 739, 114 Mo. 266.

**Sup. 1904.** In an action against a street railroad for injuries to a passenger while attempting to take a seat in a car by way of the inner foot-board, next to a car line on which cars ran in the opposite direction, one of which struck plaintiff, causing his injuries, the evidence examined, and *held* to present a question for the jury whether plaintiff was guilty of contributory negligence.—*Allen v. St. Louis Transit Co.*, 81 S.W. 1142, 183 Mo. 411.

**App. 1904.** Where a street railway company ran open summer cars, with a continuous footboard on each side, on double tracks so close together that passengers using the inside footboard would be struck by cars going in the opposite direction, and plaintiff was so struck and injured while he was passing from the rear of the car, along such footboard, to a seat, without knowledge that the tracks were so close together as to render his position dangerous, he was not guilty of contributory negligence as a matter of law, though he was well acquainted with the operation of street cars; defendant having taken no precautions to prevent such use of the inside footboard by passengers.—*Kreimelmann v. Jourdan*, 80 S.W. 323, 107 Mo. App. 64.

**App. 1916.** Whenever there is any good reason for a passenger going upon steps of a car, it is a question for the jury whether such act amounts to contributory negligence.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S.W. 46.

**App. 1918.** A street car passenger is not conclusively guilty of contributory negligence in remaining on the step after finding that he could not get inside the car, owing to the crowded condition thereof.—*Smith v. Kansas City Rys. Co.*, 204 S.W. 575.

### 347 (9). Leaving conveyance in general.

**Sup. 1908.** In a passenger's action for injuries sustained by falling into a hole on alighting from the front end of a coach, whether plaintiff was guilty of contributory negligence in getting off at that place *held* for the jury.—*Rearden v. St. Louis & S. F. Ry. Co.*, 114 S.W. 961, 215 Mo. 105.

**App. 1894.** Where plaintiff's evidence was that she did not lift her dress in passing out of the street car because her skirt was a plain round skirt not long enough to

reach the ground, and that she had in her hands a book and a muff and did not notice the bolt upon which her dress caught, thus causing the accident, the question of contributory negligence was for the jury.—*Chartrand v. Southern Ry. Co.*, 57 Mo. App. 425.

**App. 1897.** Evidence in an action to recover for personal injuries sustained by a passenger when alighting from a train examined, and *held* to require the submission to the jury of the question whether the passenger was guilty of contributory negligence in alighting at the place where the train stopped for passengers to alight.—*Talbot v. Chicago & A. Ry. Co.*, 72 Mo. App. 291.

**App. 1904.** The contributory negligence of a passenger who was injured by stepping into a ditch when she got off a street car *held*, under the evidence, a question for the jury.—*MacDonald v. St. Louis Transit Co.*, 83 S.W. 1001, 108 Mo. App. 374.

**App. 1909.** In an action for injuries sustained by a passenger in alighting from a street car, whether plaintiff was injured by the car starting with a jerk while she was attempting to alight, or whether she attempted to alight before the car had stopped *held* for the jury.—*Barnett v. Metropolitan St. Ry. Co.*, 120 S.W. 730, 138 Mo. App. 192.

**App. 1911.** Whether a passenger was guilty of contributory negligence in alighting, *held*, under the evidence a question for the jury.—*Lucas v. United Rys. Co. of St. Louis*, 133 S.W. 107, 154 Mo. App. 16.

**App. 1912.** In an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car, evidence *held* to require submission to the jury of the question of contributory negligence.—*Haskell v. Metropolitan St. Ry. Co.*, 142 S.W. 1091, 161 Mo. App. 64.

**App. 1919.** That an aged and infirm passenger misjudged the distance from the last step of a passenger coach to the depot platform and was injured while alighting without assistance does not as a matter of law constitute contributory negligence.—*Turner v. Wabash Ry. Co.*, 211 S.W. 101.

That an aged and crippled passenger, who has waited five minutes for the carrier's servants to assist him in alighting from a passenger coach, fails to call the assistance of railway employees on the depot platform before attempting to alight alone, does not as a matter of law make him guilty of negligence.—*Id.*

**App. 1920.** In an action by plaintiff passenger on defendant street railway's car for injuries when a blow on the wrist from a closing door dazed her so that after alighting she was knocked over by the swing of the rear portion of the car, question of plaintiff passenger's contributory negligence *held* for the jury.—*Carney v. United Rys. Co. of St. Louis*, 226 S.W. 308, 205 Mo. App. 495.

**App. 1923.** In passenger's action for injuries from falling as she stepped, on alighting from train, on foot box which turned over, plaintiff *held* not contributorily negligent as a matter of law.—*Green v. Chicago, B. & Q. R. Co.*, 251 S.W. 931, 213 Mo. App. 581.

**App. 1924.** In action for personal injury from stumbling over an obstruction on the depot platform after plaintiff alighted from a train, whether defendant was negligent in permitting a gangplank to lie on a step at a door to the depot, and plaintiff, having the care of two small children and carrying a baby in her arms, was contributorily negligent in stumbling over it, were for the jury.—*Roussell v. St. Louis-San Francisco Ry. Co.*, 257 S.W. 516.

⚡347 (10). *Preparing to leave conveyance before it stops.*

**Sup. 1906.** A passenger, while standing on the platform of a street car, was thrown therefrom by the jerking of the car. The passenger, when within about 300 feet of his destination, went to the platform to be ready to step off on the car reaching the point of destination. It was the custom for passengers to leave the car by way of the platform. *Held*, that the passenger was not guilty of contributory negligence as a matter of law, precluding a recovery, though there were unoccupied seats in the car.—*Wellmeyer v. St. Louis Transit Co.*, 95 S.W. 925, 198 Mo. 527.

**Sup. 1910.** It is not negligence per se to step on the running board of a street car while the car is running slowly preparatory to stopping.—*Setzler v. Metropolitan St. Ry. Co.*, 127 S.W. 1, 227 Mo. 454.

**App. 1916.** Where plaintiff left her seat in a train because bidden by the auditor, and had her fingers caught in the door when it swung shut as the train stopped, the question whether she was guilty of contributory negligence in getting up before the train stopped was for the jury.—*Daniels v. St. Louis, I. M. & S. Ry. Co.*, 181 S.W. 599.

⚡347 (11). *Alighting from moving conveyance.*

Alighting from a slowly moving street car is not negligence as a matter of law.—**Sup. 1920.** *Sivicek v. Dunham*, 219 S.W. 594;

**App. 1881.** *Fortune v. Missouri R. Co.*, 10 Mo. App. 252; (1907) *Bond v. Chicago, B. & Q. Ry. Co.*, 99 S.W. 30, 122 Mo. App. 207.

**Sup. 1874.** The fact that a boy 17 years of age jumped or stepped from a street car drawn by horses while in rapid motion does not constitute negligence as a matter of law, but the question of negligence under the particular circumstances of the case is one of fact for the jury.—*Wyatt v. Citizens' R. Co.*, 55 Mo. 485.

**Sup. 1875.** Whether an attempt to step from a train in motion is, under the particular circumstances of a given case, such negligence as will relieve the company of responsibility, is a question of fact for the jury.—*Dess v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371.

**Sup. 1880.** Where the only negligence alleged against a railway company was in failing to stop its train at a depot to permit a passenger to alight, and the passenger voluntarily attempted to alight while the train was in motion, it was for the jury to determine under all the circumstances whether the passenger in alighting while the train was in motion was guilty of contributory negligence precluding a recovery.—*Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414.

**Sup. 1884.** Whether the attempt of a passenger to step from the cars when the train was in motion after the train had stopped an insufficient time at a station to permit her to alight was contributory negligence was a question for the jury.—*Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608.

**Sup. 1885.** Whether it is contributory negligence for a passenger to step from a car while it is in motion, to a station platform, depends on the circumstances of the case and the speed of the train, and is a question for the jury.—*Leslie v. Wabash, St. L. & P. Ry. Co.*, 88 Mo. 50.

**Sup. 1904.** Whether a person is guilty of negligence in alighting from a slowly moving train just as it was leaving the station is a question for the jury.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.



**Sup. 1916.** Where a passenger jumped from a moving train to escape other passengers who were pursuing and threatening to kill him, his contributory negligence is not a question of law, but one of fact for the jury.—*Utterback v. St. Louis & S. F. Ry. Co.*, 189 S.W. 1171.

**Sup. 1922.** Where plaintiff stopped from a street car while it was running at the rate of 18 miles per hour, such act was negligence per se, and the court may direct a verdict for defendant.—*Kirby v. United Rys. Co. of St. Louis*, 242 S.W. 79.

**App. 1887.** Whether a passenger, in leaving a train while it is in slow motion near the depot, is guilty of contributory negligence, is, unless recklessness or heedlessness is apparent, a question of fact for the jury.—*Taylor v. Missouri Pac. Ry. Co.*, 26 Mo. App. 336.

**App. 1892.** In an action against a railway company for damages sustained by a passenger by reason of his alighting from a train while in motion at a station, evidence examined, and *held* that the question of the passenger's negligence barring a recovery was for the jury.—*Richmond v. Quincy, O. & K. C. Ry. Co.*, 49 Mo. App. 104.

**App.** The question whether it is contributory negligence for a passenger to alight from a train moving at a speed not greater than three miles an hour is one for the jury.—(1903) *Dawson v. St. Louis Transit Co.*, 76 S.W. 689, 102 Mo. App. 277; (1904) *Gress v. Missouri Pac. Ry. Co.*, 84 S.W. 122, 109 Mo. App. 716.

**App. 1903.** Where a passenger on a street car signaled the motorman to stop for a certain crossing, and the car slowed down, as the passenger supposed, in response to the signal, and while it was moving at the rate of about three miles an hour, he undertook to alight, and the car suddenly started forward, whereby he sustained injuries, the passenger was not guilty of negligence as a matter of law.—*Dawson v. St. Louis Transit Co.*, 76 S.W. 689, 102 Mo. App. 277.

**App. 1903.** Where evidence is conflicting as to whether a passenger left a street car voluntarily while it was in motion, or was thrown from it by the car's sudden starting, the question of his contributory negligence was for the jury.—*Scamell v. St. Louis Transit Co.*, 77 S.W. 1021, 103 Mo. App. 504.

**App. 1904.** A passenger is guilty of contributory negligence as a matter of law in at-

tempting to leave a train moving at the rate of five miles an hour.—*Gress v. Missouri Pac. Ry. Co.*, 84 S.W. 122, 109 Mo. App. 716.

**App. 1907.** Except where the risk involved in stepping from a moving car appears to be so great that an ordinarily prudent person would not incur it, the question of negligence in the act is for the jury.—*Green v. Metropolitan St. R. Co.*, 99 S.W. 28, 122 Mo. App. 647.

**App. 1908.** An attempt to alight from a moving train is not negligence per se, but its speed, the age, activity, and strength of the passenger, and other relevant facts should be considered in determining the question of negligence.—*Anderson v. Chicago & A. Ry. Co.*, 110 S.W. 650, 131 Mo. App. 580.

**App. 1912.** It is not negligence per se for a street car passenger to attempt to alight from a car in motion, unless the risk involved in the act, because of the speed of the car, appears to be so great that an ordinarily prudent person would incur it, and the question of negligence is for the jury.—*Haskell v. Metropolitan St. Ry. Co.*, 142 S.W. 1091, 161 Mo. App. 64.

**App. 1914.** Whether a passenger attempted to alight while the car was in motion *held* for the jury.—*Hays v. Metropolitan St. Ry. Co.*, 170 S.W. 414, 182 Mo. App. 393.

**App. 1915.** It is in general not negligence per se for a passenger to attempt to alight from a moving train or street car.—*Moore v. Metropolitan St. Ry. Co.*, 180 S.W. 408.

**App. 1922.** Where a passenger fell and was injured in alighting from a moving train in the nighttime after being told by its operatives that his station had been reached and opened the door for him to alight, the question as to whether he was negligent in his failure to examine where he was going to alight was for the jury.—*Williams v. Missouri Pac. R. Co.*, 243 S.W. 188.

**App. 1924.** Contributory negligence of passenger in alighting from moving train after it passed his station at alleged direction of brakeman *held* under evidence for jury.—*Bogre v. Wabash Ry. Co.*, 266 S.W. 333.

347(12). Alighting from conveyance at place other than station or platform.

**Sup. 1914.** Where a train stopped at a crossing about a quarter of a mile from the station and immediately before an employe

announced the name of the station and 20 minutes for supper, and proceeded to open the car doors and lift the trap leading to the ground so that passengers could alight, a passenger alighting was not negligent, as a matter of law.—*Wentz v. Chicago, B. & Q. R. Co.*, 168 S.W. 1166, 259 Mo. 450, Ann. Cas. 1916B, 317.

Whether a passenger alighting from a train stopping at a crossing before reaching a station was guilty of contributory negligence *held* for the jury.—*Id.*

**Sup. 1920.** In action for injuries to passenger carried past her destination and struck by another car in going back to destination by way of the tracks, an instruction that there could be no finding for plaintiff without a finding that a reasonably prudent person could not have discovered any other route was erroneous, as requiring plaintiff to take any route other than the tracks, whether safe or not.—*Gott v. Kansas City Rys. Co.*, 222 S.W. 827.

**Sup. 1923.** Where a 17 year old boy was injured by falling into an unguarded sluiceway after alighting from a train which had carried him, after dark, beyond his station to which he had taken passage, he having always theretofore gone by street railway, evidence *held* not to show him so familiar with the station and its surroundings as to be charged with contributory negligence in leaving the place where he was set down.—*Payne v. Davis*, 252 S.W. 57, 298 Mo. 645.

A passenger who was set down at night at an unfamiliar place beyond his station, and followed a beaten pathway beside the tracks toward a light near the next station, *held* not guilty of such negligence, as a matter of law, as barred him from recovering damages for injuries from falling into an open sluiceway under the tracks.—*Id.*

—347 (13). *Crossing tracks after alighting from car.*

**Sup. 1890.** Plaintiff, a passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barb wire, but soon came to a bridge to cross which he had to mount a flat car. Reaching the front of the car, and being anxious lest the train start, he, having first examined the ground, jumped from the coupling outward with one hand on the car in front, and in landing broke his leg. *Held*, that plaintiff's

contributory negligence was a question for the jury.—*Adams v. Missouri Pac. Ry. Co.*, 12 S. W. 637, 100 Mo. 555, judgment modified on rehearing 13 S.W. 509, 100 Mo. 555.

**Sup. 1895.** Plaintiff's decedent, in alighting at night from a car on a dummy line, with the operation of whose trains he was familiar, was struck by a train on the opposite track, and killed. The train on which he rode had just passed his station, but was coming to a stop when he got off. The conductor, however, lighted him off at the steps. *Held*, that decedent was not, as a matter of law, guilty of contributory negligence, though, if he had looked, he might have seen the approaching train.—*McDonald v. Kansas City & I. Rapid-Transit Ry. Co.*, 29 S.W. 848, 127 Mo. 38.

**Sup. 1929.** Contributory negligence of one struck by street car while crossing street to change cars *held* for jury.—*Wilson v. Wells*, 13 S.W.(2d) 541.

**App. 1902.** In an action against a street car company for injuries to a passenger, who, immediately after alighting and starting to cross the street behind the car, was struck by another car going in the opposite direction, evidence *held* to require submission to the jury of the issue of plaintiff's contributory negligence.—*Hornstein v. United Rys. Co. of St. Louis*, 70 S.W. 1105, 97 Mo. App. 271.

**App. 1923.** Where a street railroad impliedly invited its patrons to cross tracks to a landing at a street intersection, a pedestrian whose foot was caught in a switch was not contributorily negligent as a matter of law because he deviated from the path provided, where the lights established to guide patrons were not lighted.—*Brooks v. Union Depot Bridge & Terminal R. Co.*, 258 S.W. 724, 215 Mo. App. 643.

—347 (14). *Acts by permission or direction of carrier's employees.*

**App. 1900.** Plaintiff, a passenger on defendant's train, did not leave the train when it arrived at his station. The train was a long one and arrived during the nighttime, and plaintiff supposed when it stopped that it was at a water tank as the station was not called out by defendant's servants. He discovered his mistake when the train was leaving the station, and went out on the back platform of his car and was told three times by a brakeman on the platform to get off. The train at the time was running at about 20 miles an hour, but he knew very little about railroad trains and did not know how fast it was go-

ing. Relying on the knowledge of the brakeman he jumped from the train and was injured. *Held*, in an action to recover damages, that whether he was guilty of such contributory negligence as would defeat his right of recovery was a question for the jury.—*Owens v. Wabash Ry. Co.*, 84 Mo. App. 143.

**App. 1908.** Whether it is negligence for a passenger with the knowledge and implied assent of the trainmen to take a position on the car less safe than that of riding in a seat is a question for the jury.—*Vessels v. Metropolitan St. Ry. Co.*, 108 S.W. 578, 129 Mo. App. 708.

347 (15). Acts in emergencies.

**Sup. 1893.** In an action against a street railway company for personal injuries, where plaintiff's evidence showed that she was injured by jumping from a cable car of defendant, upon which she was a passenger, and which was approaching a railroad grade crossing, because the gripman, after being repeatedly warned of the near approach of a train, not only failed to stop his car, although he could easily have done so, but increased its speed to make the crossing before the train, a motion for a nonsuit was properly denied.—*Bischoff v. People's Ry. Co.*, 25 S.W. 908, 121 Mo. 216.

348. — Instructions.

348 (1). In general.

**Sup. 1909.** In an action against the owners of an office building who ran passenger elevators for injury to a passenger on the elevator, the instructions given *held* to properly present the law of the case as to contributory negligence.—*Cooper v. Century Realty Co.*, 123 S.W. 848, 224 Mo. 709.

**App. 1886.** In an action against a carrier for injuries sustained by a passenger, instructions employing the terms "without fault on his part," referring to plaintiff, were not objectionable as not submitting the issue of contributory negligence.—*Stafford v. Hannibal & St. J. R. Co.*, 22 Mo. App. 333.

**App. 1889.** In an action against a railroad company for personal injuries to a passenger, an instruction predicating plaintiff's right to recover upon a hypothetical state of facts from which the jury might infer contributory negligence, and telling them to find for plaintiff if they found such facts to be true, was not erroneous for failure to require a finding of absence of contributory negligence, where such a finding was required by

another instruction.—*Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 36 Mo. App. 203.

**App. 1901.** In an action against a carrier for damages for injuries an instruction which precludes a recovery if plaintiff was guilty of negligence irrespective of the fact that such negligence did or did not contribute to his injury is improper.—*Muth v. St. Louis & M. R. R. Co.*, 87 Mo. App. 422.

**App. 1902.** Where defendant denied its negligence and alleged contributory negligence, an instruction to find for defendant if the injuries were the result of an accident was improperly modified by adding the words "that was not caused by defendant's negligence," since, as modified, it impliedly authorized a verdict for plaintiff, though guilty of contributory negligence.—*Maxey v. Metropolitan St. Ry. Co.*, 68 S.W. 1063, 95 Mo. App. 303.

**App. 1904.** Where, in an action against a street railway company for injuries to a passenger, there was no plea of contributory negligence, there was no occasion for an instruction that issue of such negligence was not in the case.—*Duffy v. St. Louis Transit Co.*, 78 S.W. 831, 104 Mo. App. 235.

**App. 1915.** An instruction in an action for injuries to a street car passenger *held* defective for failing to require the jury to find that she exercised ordinary care.—*Schwannfeldt v. Metropolitan St. Ry. Co.*, 176 S.W. 1098.

**App. 1915.** In a passenger's action against a street railroad for personal injury, an instruction *held* not objectionable as not requiring jury to believe that plaintiff was exercising due care.—*Davis v. Metropolitan St. Ry. Co.*, 177 S.W. 1097.

348 (2). Care required of children and others under disability.

**Sup. 1891.** Plaintiff, a boy 12 years old, was injured by falling from a street car while riding on the front platform of the car. He alleged in his petition that he did not know that it was dangerous and unsafe to ride on the platform of the car, but did not say a word in his testimony in support of such statement. He had ridden on street cars before and had some education and was a newsboy. *Held*, that it may be assumed that he knew it was safer in the car than on the platform, and because of such knowledge propositions of law announced by the court as to the rights and liabilities of street car passengers who are adults and ride on the platform

will apply to plaintiff.—*Willmott v. Corrigan Consol. St. Ry. Co.*, 17 S.W. 490, 103 Mo. 535, affirming judgment in banc 16 S.W. 500, 103 Mo. 535.

—348 (3). **Awaiting and seeking transportation.**

**Sup. 1918.** In action for injuries sustained by prospective passenger, because of defects in approach to station platform, defense of defendant railroad being that plaintiff was negligent in using such approach instead of an approach at the other end of the platform, instructions given for plaintiff and defendant *held* consistent, and to fairly present all the issues.—*Gurtman v. Lusk*, 208 S. W. 61.

**Sup. 1925.** Requested instruction that passenger could not recover if by looking he could have seen approaching car was properly refused.—*Willi v. United Rys. Co. of St. Louis*, 274 S.W. 24.

**Sup. 1927.** Instruction denying recovery by intending passenger for negligence, not limited to contributory negligence, properly refused.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

—348 (4). **Entering conveyance.**

**Sup. 1882.** In an action against a carrier it was error to instruct that plaintiff's effort to get on a train while in motion was negligence per se, without regard to the speed of the train or the fact that it may not have been stopped a sufficient length of time to enable plaintiff to get on.—*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475.

**Mo. 1909.** In an action for injuries while attempting to board a street car by being caught between the car and a railing extending from the station platform parallel with the track across a viaduct, an instruction requested by defendant that if the jury found that, when the car started, plaintiff was standing on the platform of the viaduct holding on to the hand rail of the car, intending to board such car, and that after the car started, and while it was in motion, attempted to get upon the car and was injured, their verdict must be for the defendant, was properly refused.—*Joyce v. Metropolitan St. Ry. Co.*, 118 S.W. 21, 219 Mo. 344.

There was evidence that, when the car started, plaintiff was some three feet from it, and did not have hold of it, and that he attempted to board it after it was in motion. *Held*, that an instruction that if plaintiff attempted to get upon the car while it was in

motion he assumed the risk of danger, and that his injuries, resulting therefrom were caused by his own negligence and the verdict should be for defendant, was improperly refused.—*Id.*

**Sup. 1909.** In an action for injuries claimed to have been caused by the premature starting of a street car while boarding it, where the evidence showed that the car stopped at a usual place and for the usual time, and plaintiff testified that he was waiting for the car and that he heard and understood the signal to start, and another testified that she boarded the car at the rear and had walked through it when the signal to start was given, an instruction was proper, as going to plaintiff's negligence, that, if the car stopped at the usual place a reasonable length of time to enable plaintiff to board it in safety by exercising ordinary care, the jury should find for defendant.—*Quinn v. Metropolitan St. Ry. Co.*, 118 S.W. 46, 218 Mo. 545.

**Sup. 1915.** In action against street railroad for personal injury, defendant's requested instruction that, if plaintiff attempted to board the car after it had started, he could not recover, *held* warranted by evidence.—*Northam v. United Rys. Co. of St. Louis*, 176 S.W. 227.

**Sup. 1917.** In action for injuries while attempting to board car, after motorman had slowed down in response to signal given, instruction for defendant company that plaintiff had no right to attempt to board car while in motion *held* erroneous.—*Vrooman v. Harvey*, 197 S.W. 118.

**App. 1903.** Whether it was negligence to attempt to board a street car moving very slowly was a question for the jury, and was properly submitted by an instruction that, to authorize a recovery for injuries in making the attempt, the plaintiff must have exercised ordinary care.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

**App. 1905.** Defendant's requested instruction, in an action for injury to plaintiff while attempting to board defendant's street car, that, if plaintiff attempted to board it while it was going at such speed that a person of ordinary care and prudence would not have attempted to do so under the circumstances, then he was guilty of contributory negligence, and could not recover, is properly amended by the insertion after the word "circumstances" of the clause, "and that fact directly contributed to cause plaintiff's injury"; plaintiff's evidence being that he landed safely on the

step of the car, and was thrown therefrom by the sudden forward lurch of the car, and, if this is true, such lurch, and not the attempt to board the car while it was in motion, being the proximate cause of his injury.—*Spencer v. St. Louis Transit Co.*, 86 S.W. 593, 111 Mo. App. 653.

**App. 1907.** An instruction defining plaintiff's duty in entering and leaving defendant's car was not erroneous because of the use of the expression "due diligence" when in all of the instructions the terms "reasonable diligence," "ordinary care," and "reasonable care" are used synonymously.—*Bond v. Chicago, B. & Q. Ry. Co.*, 99 S.W. 30, 122 Mo. App. 207.

**App. 1909.** An instruction in an action for injuries to a passenger boarding a train while being made up *held* not erroneous, as excluding the defenses of contributory negligence and assumption of risk.—*Wise v. Wabash R. Co.*, 115 S.W. 452, 135 Mo. App. 230.

**App. 1919.** Instruction *held* not subject to objection that it did not limit right of plaintiff to boarding defendant's street car at the usual stopping place.—*Sparks v. Harvey*, 214 S.W. 249.

348 (5). Conduct in transit.

**Sup. 1863.** An instruction that if defendants' agents permitted a person to take a position on the steps of one of their cars, and while standing there he was killed, then deceased was guilty of no negligence, is incorrect, as excluding the idea of his voluntarily taking the position there being no evidence to the point.—*Huelsenkamp v. Citizens' Ry. Co.*, 34 Mo. 45.

**Sup. 1889.** An instruction that if "plaintiff acted with reasonable and ordinary care in not taking hold of a strap, or in not moving further forward, though if he had done so the accident would not have happened, and as a prudent man would ordinarily have acted," he was using all the care and diligence required, being correct in itself, cannot be assigned for error, as inferentially excluding other circumstances relied on by defendant to show contributory negligence.—(1888) *Dougherty v. Missouri R. Co.*, 8 S.W. 900, 97 Mo. 647, judgment reversed on rehearing 11 S.W. 251, 97 Mo. 647.

**Sup. 1909.** Plaintiff testified that when he fell off a street car he had both feet upon the steps and was holding to the guard rails with both hands, and rode a short distance in that position, until a passenger discovered

that her child had not entered the car and began to scream, when plaintiff released his hold with one hand, thinking the woman was going to jump off, and was thrown off by a jerk, but it was not shown that the jerk was unusual; the car being then crossing other tracks. *Held* proper to instruct that if plaintiff got on and rode some distance in a reasonably safe position, and thereafter let go one of his handholds and fell off, the jury should find for defendant.—*Quinn v. Metropolitan St. Ry. Co.*, 118 S.W. 46, 218 Mo. 545.

**App. 1901.** In an action against a street railway company for injury to a passenger while riding on the bumpers, the evidence showed that the plaintiff was not injured on account of the fact that he was on the bumpers, but on account of the fact that he was compelled to jump to avoid a collision by a car approaching in the rear. *Held*, that it was proper to refuse an instruction to find for defendant if the jury found that riding on the bumpers was dangerous.—*Paquin v. St. Louis & S. Ry. Co.*, 90 Mo. App. 118.

**App. 1907.** In an action against a street railway for injuries received by a passenger, by being thrown off the platform of one of defendant's cars by a sudden lurch, an instruction that it is not necessarily negligent for one to ride on the rear platform of a car, though the same is crowded; that if when crowded defendant's car stopped, and plaintiff and others boarded it as passengers without objection by defendant, plaintiff was not negligent in boarding the car and remaining on the platform thereof, unless the danger was so obvious that a reasonably prudent person would have refrained from so doing, and unless after boarding the car plaintiff failed to exercise due care, was not erroneous, as taking from the jury the question whether plaintiff was guilty of negligence in riding on an overcrowded car.—*Baskett v. Metropolitan St. Ry. Co.*, 101 S.W. 138, 123 Mo. App. 725.

**App. 1908.** In an action against a railway company for injury to a freight train passenger, an instruction that if he voluntarily sat near an open door of the caboose, etc., and was thrown from the car by the jar made by a coupling, he could not recover, having been properly refused for failing to refer the jury to the conduct of a reasonably prudent man and the exercise of ordinary care for his own safety as the standard by which the passenger's conduct should be measured, it was not error to modify it by directing that, though he knew he was liable to be thrown from the car, he could recover unless he was thrown by

a usual and ordinary jar.—*Mitchell v. Chicago & A. Ry. Co.*, 112 S.W. 291, 132 Mo. App. 143.

**App. 1909.** Plaintiff's contract with defendant railroad for the transportation of horses permitted plaintiff to accompany the horses, and required him to look after and feed them. While in the car for that purpose, a switch engine struck it, throwing the horses down on plaintiff, injuring him. In an action for the injuries, plaintiff testified that, on defendant's servants saying that they were going to do some switching, he told them that he would get in the car and feed, but this was denied by defendant's witnesses. *Held*, that defendant was entitled to an instruction that if, before the car was placed in a train for transportation, plaintiff, knowing that it was about to be switched, entered it without informing defendant's servants of his intention so to do, and if his so doing was negligence contributing to his injury, he could not recover.—*Bruce v. Chicago, B. & Q. Ry. Co.*, 116 S.W. 447, 136 Mo. App. 204.

#### ←348 (6). Leaving conveyance in general.

**Sup. 1894.** In an action against a street-railroad company for injuries caused by a fall either in getting on a street car, or in getting off after the car started, where there was evidence which justified the court in submitting the question of plaintiff's negligence in getting off the car as one of fact, it was not error to omit to state what facts, if found to be true, would constitute negligence on her part.—*Olfermann v. Union Depot R. Co.*, 28 S.W. 742, 125 Mo. 408, 46 Am. St. Rep. 483.

**Sup. 1909.** In an action for injuries sustained by suddenly starting a street car while plaintiff was alighting, an instruction that, even if plaintiff was injured by defendant's negligence, he could not recover if his own act or conduct directly contributed to the injury, was erroneous in not requiring that plaintiff's act or conduct which contributed to the injury be negligent.—*Dowd v. Metropolitan St. Ry. Co.*, 120 S.W. 772, 222 Mo. 58.

**Sup. 1920.** In a street car passenger's action for personal injuries sustained while stepping into a hole in the street while alighting, a requested instruction on the theory that plaintiff was negligent in sticking her foot under the step, if construed to mean that such act was the cause of the injury, and that therefore defendant's negligence did not cause it, was erroneous as not requiring a finding that her act was the sole cause of injury, but authorized a finding for defendant if plaintiff

was injured in that manner if not in the exercise of reasonable care, although defendant's negligence was the proximate cause of the injury.—*Herlford v. Kansas City Rys. Co.*, 220 S.W. 899.

**App. 1902.** The insertion of the word "voluntarily" in instructions requested by defendant, so as to make them read that if plaintiff's injuries "were caused by his voluntarily stepping from a car," etc., and that if "plaintiff did voluntarily step from said car," did not alter their meaning, and was no cause for complaint.—*Gorman v. St. Louis Transit Co.*, 70 S.W. 731, 96 Mo. App. 602.

**App. 1903.** Where plaintiff's evidence showed that he was on the rear platform of defendant's street car, in the act of getting off at a place where it had stopped before crossing some railroad tracks, but was prevented from doing so by the sudden starting of the car and its rapid motion, and there was no evidence to the contrary, it was error to predicate a charge of contributory negligence on the assumption that he had taken his position on the rear platform, not for the purpose of getting off before reaching the railway tracks, but for his own convenience in getting off at some point beyond them.—*Fleming v. St. Louis & S. Ry. Co.*, 74 S.W. 382, 101 Mo. App. 217.

**App. 1919.** In an action by a crippled passenger against a railroad company for injuries sustained in being compelled to alight from a passenger train without assistance, an instruction that plaintiff was negligent if he stepped down, without looking to see if there was a portable step in place was misleading.—*Turner v. Wubash Ry. Co.*, 211 S.W. 101.

**App. 1919.** Instruction *held* not objectionable as failing to limit plaintiff's right to board street car at usual stopping place.—*Sparks v. Harvey*, 214 S.W. 249. See Carriers, ←348(4) in this Digest.

#### ←348 (7). Alighting from moving conveyance.

**Sup. 1876.** An instruction requested by plaintiff, that if the conductor of the street car on which plaintiff was riding refused to stop the car when asked by plaintiff, and the latter attempted to alight carefully and without negligence, they should find for plaintiff, was properly refused where the evidence showed that plaintiff was in a crippled condition from a sore knee, and no account was taken of it in the instruction.—*Wyatt v. Citizens' Ry. Co.*, 62 Mo. 408.

A further instruction that if the jury are satisfied that the car was moving faster than

usual when plaintiff got off, and that plaintiff knew the risk and danger, and was not influenced by the remark of the conductor, "to jump," this was evidence of want of care, was objectionable, in that it did not refer to plaintiff's physical condition or the facts which, if satisfactorily proved, would, in the estimation of the court constitute negligence, and as tending to lead the jury to infer that plaintiff knew the risk.—*Id.*

**Sup. 1880.** In an action against a railway company to recover damages sustained by a passenger while alighting from the train because of the negligence of the company in failing to stop the train, an instruction that, if the servants in charge of the train were negligent in failing to stop it at the station a sufficient length of time to allow a passenger to alight, and by reason of such negligence he was injured, he was entitled to a verdict, was erroneous, because it withdrew from the jury the question whether plaintiff was guilty of contributory negligence in attempting to alight while the train was in motion.—*Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414.

**Sup. 1884.** Instructions in respect to contributory negligence of passenger in alighting from train which started before she had time to leave the car approved.—*Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608.

**Sup. 1903.** Where a passenger, in her petition against a street railway company, alleged, and her evidence tended to prove, and her requests for instructions assumed, that the car had stopped when she attempted to alight therefrom and was injured, she cannot complain of instructions, on defendant's request, that, if the injuries were caused by her leaving the car before it had stopped, or if she got off the car while it was yet moving, the company is not liable.—*Peck v. St. Louis Transit Co.*, 77 S.W. 736, 178 Mo. 617.

**Sup. 1906.** In an action for death of a passenger by being thrown from a street car, defendant requested the court to charge that if deceased, of her own volition, got off from the car while in motion, and in consequence of her own act in getting off was thrown to the ground and sustained injuries from which she died, plaintiff could not recover though the car had not sufficient guards to the seats or was unduly crowded or was running at an unusual rate of speed, or though the track was rough and caused jerks and shocks of the car as it proceeded over the same. The court modified the instruction by adding a clause, unless the jury believe that the crowded condition of the car, the insufficiency of the

guards on the seats or the running at an unusual speed or the roughness of the tracks, jerks, etc., or all combined, was the proximate cause of the injury. *Held*, that the instruction in its original form correctly presented defendant's defense of contributory negligence, and that the modification was improper.—*Van Horn v. St. Louis Transit Co.*, 95 S.W. 326, 198 Mo. 481.

Where, in an action for death of a passenger by being thrown from a street car, certain instructions presented the theory that if deceased voluntarily placed herself in a position of peril or voluntarily left the car "without the knowledge of the conductor or motorman in charge of the car or before they could interpose to prevent her," the carrier was not liable, such instructions did not cover an instruction that if decedent of her own volition got off the car while in motion and in consequence of her own act was thrown to the ground, and sustained injuries of which she afterwards died, the verdict must be for defendant, whether the conductor or motorman knew or might have known that she was in the act of getting off the car, or whether they took any steps to prevent her doing so.—*Id.*

**Sup. 1922.** An instruction in action for injuries sustained in alighting from a street car that plaintiff could not recover if he attempted to alight before the car stopped authorized a verdict for defendant within itself, without submitting the question as to whether plaintiff was guilty of any negligence whatever and hence was insufficient even if contributory negligence was properly pleaded.—*Keppeler v. Wells*, 238 S.W. 425.

**App. 1903.** In an action for injuries sustained by a passenger who was attempting to alight from a street car moving at the rate of three miles an hour when the car suddenly started forward, the use in an instruction of the word "slowly" with reference to the speed of the car was not erroneous, especially where other instructions fully and correctly submitted the issue of contributory negligence.—*Dawson v. St. Louis Transit Co.*, 76 S.W. 689, 162 Mo. App. 277.

**App. 1903.** In an action for injuries to a passenger while alighting from a street car, defendant requested an instruction that plaintiff had no right to alight or attempt to alight from the car after it had started, or while it was in motion, and, if he did so, he assumed the risk of injury; that if, after the car had started or while it was in motion, plaintiff attempted to get off and was thrown down by the motion of the car, then his injuries, if any,

were caused by his own fault, and the verdict should be for defendant. *Held*, that the instruction as requested was misleading, and was properly modified by requiring that plaintiff must have been thrown down only by the motion of the car, "and without any negligence on the part of defendant's servants in charge thereof."—*Hurley v. Metropolitan St. Ry. Co.*, 96 S.W. 714, 120 Mo. App. 262.

**App. 1909.** Where, in an action for injuries to a street car passenger by an alleged premature start, plaintiff did not allege that the west side of a street intersection was the customary stopping place for the discharge of east-bound passengers, the court's refusal of plaintiff's request, failing to hypothesize as an element of plaintiff's proof that the west side of the intersection was the regular stopping place, and the giving of an instruction for defendant that the jury believed the regular stopping place was on the east side of the intersection, and that there was no regular stopping place on the west side, it was plaintiff's duty to wait until the car reached the east side of the street, and, if her injuries were caused by her attempt to alight before such point was reached, while the car was in motion, she could not recover, was error.—*Groshong v. United Rys. Co. of St. Louis*, 121 S.W. 1084, 142 Mo. App. 718.

**App. 1912.** An instruction *held* not erroneous as tending to justify a passenger in attempting to alight from a moving car.—*Hutton v. Metropolitan Street Ry. Co.*, 150 S.W. 722, 166 Mo. App. 645.

**App. 1915.** Instruction hypothesizing defendant's claim that street car passenger, disregarding conductor's warning, alighted while the car was in motion, *held* improperly refused. *Tanchof v. Metropolitan St. Ry. Co.*, 177 S.W. 813.

**App. 1918.** An instruction to effect that plaintiff could not recover if she attempted to alight while train was moving was misleading in that jury might infer that she could not recover if train was moving at any time after she left her seat.—*Rooker v. Deering Southwestern Ry. Co.*, 204 S.W. 556.

☞348 (8). **Disobedience of rules of carrier.**

*See explanation, page iii.*

☞348 (9). **Acts by permission or direction of carrier's employes.**

*See explanation, page iii.*

☞348 (10). **Acts in emergencies.**

*See explanation, page iii.*

☞348 (11). **Proximate cause of injury.**

*See explanation, page iii.*

☞348 (12). **Injury avoidable by care of carrier.**

**Sup. 1899.** In an action against a street-railway company for the death of a passenger from injuries received while riding on a running board used to step on in getting on and off the car, an instruction that if the passenger voluntarily left his seat in the car to ride on the running board, and that he would not have been injured had he not been standing thereon, and if the position on the running board was an unsafe one for passengers, no recovery can be had, is properly refused, since it prohibits a recovery notwithstanding the carrier's failure to exercise the greatest care to carry him safely, though he had voluntarily assumed an unsafe position.—*Sweeney v. Kansas City Cable Ry. Co.*, 51 S.W. 682, 150 Mo. 385.

In an action for the death of a passenger from injuries received while riding on a car, an instruction that if the passenger voluntarily left his seat, and took up the position in which he was injured, and that he would not have been injured had he remained in his seat, no recovery can be had unless the person in charge of the car saw him in his position of danger in time to have prevented the injury, is properly refused, as it assumes that the position which the passenger took was dangerous as a matter of law, and that no recovery could be had, though the injury was caused by the negligent management of the train.—*Id.*

**App. 1905.** In an action for injuries to an elevator passenger, an instruction declaring that negligence on plaintiff's part, directly contributing to the injury, would not bar her right to recovery, if defendants' agent or servant, after discovering plaintiff's danger, might, by the exercise of ordinary care, have prevented the injury to her, was erroneous, as misleading, and as requiring of the operator no more than ordinary care to save plaintiff after he discovered her peril.—*Heusler v. Stix*, 88 S.W. 108, 113 Mo. App. 162.

The instruction was also objectionable as eliminating defendants' liability in case the elevator operator was negligent in not sooner discovering plaintiff's peril.—*Id.*

**App. 1907.** The refusal to charge that, if the passenger was injured by the negligence of the company, he could not recover if he by his own act or conduct contributed to his own injury, was erroneous.—*Ghio v. Metropolitan St. Ry. Co.*, 103 S.W. 142, 125 Mo. App. 710.



**App. 1920.** In an action against a street railway, founded on the humanitarian doctrine by an intending passenger, injured by the overhang of a car turning a curve, *held* that court did not err in refusing defendant's instruction, requiring the jury to find that defendant's servants actually knew that plaintiff was in a position of peril.—*Flynn v. Kansas City Rys. Co.*, 226 S.W. 974.

**App. 1928.** Instruction that cattle caretaker's contract was no defense if railroad negligently directed caretaker to go to caboose in dark *held* not to submit case under humanitarian rule.—*Edmondson v. Missouri Pac. R. Co.*, 8 S.W.(2d) 103.

348 (13). Presumptions and burden of proof.

**Sup. 1903.** A charge in an action against a street railway company for negligence, setting out plaintiff's theory, and stating that the burden is on plaintiff as to the act of negligence "throughout the case," is not objectionable as requiring the plaintiff to prove herself free from contributory negligence, where no reference is made to that.—*Peck v. St. Louis Transit Co.*, 77 S.W. 736, 178 Mo. 617.

**Sup. 1928.** Instruction that defendant had the burden of proving that degree of plaintiff's intoxication was the cause of injury was erroneous.—*Lewis v. Illinois Cent. R. Co.*, 3 S.W.(2d) 371, 319 Mo. 233.

**App. 1903.** Where, in an action against a street railway company for injury to a passenger, the court, on behalf of the company, directs a finding for it if she was not caused to fall by the starting of the car with a sudden jerk, but through an attempt to leave the car while it was in motion, she is entitled to an instruction that, before there can be a finding for the company because of her negligence, there must be a preponderance of evidence that she attempted to alight before the car stopped.—*Kennedy v. St. Louis Transit Co.*, 78 S.W. 77, 103 Mo. App. 1.

**App. 1903.** An instruction that the burden of proving contributory negligence rests on the defendant is not erroneous as depriving the defendant of the benefit of plaintiff's own evidence, though contributory negligence, if shown at all, was shown by plaintiff's evidence alone.—*Maguire v. St. Louis Transit Co.*, 78 S.W. 838, 103 Mo. App. 459.

**App. 1908.** An answer in an action against a carrier by a passenger to recover for injuries was treated by the trial court and both parties as pleading contributory negli-

gence, and several instructions bearing on that issue were given on request of defendant. *Held*, that it was not error to instruct that contributory negligence is an affirmative defense to be proven by defendant unless it appears in other evidence, and that, if such defense is not established, the finding should not for that reason be for plaintiff, but it should be that there was no contributory negligence in the case.—*Gerhart v. Metropolitan St. Ry. Co.*, 112 S.W. 12, 132 Mo. App. 546.

348 (14). Conformity to pleadings and issues.

**Sup. 1891.** Where plaintiff alleged that the injury was caused by the negligence of defendant's driver, and defendant denied this, and alleged contributory negligence on the part of plaintiff, it is error for the court in instructing the jury not to present the effect of contributory negligence as well as the carelessness of defendant.—*Willmott v. Corrigan Consolidated St. Ry. Co.*, 16 S.W. 500, 106 Mo. 535, judgment affirmed by court in banc 17 S.W. 490, 106 Mo. 535.

**Sup. 1892.** An instruction that, though plaintiff was negligent in attempting to board the moving train, still, if those in charge thereof could, by using ordinary care after discovering him, have prevented the injury, the verdict should be for plaintiff, while correct in the abstract, is properly refused, where there is no evidence that the train could have been stopped, after plaintiff was seen getting on, so as to have prevented the accident.—*Fulks v. St. Louis & S. F. R. Co.*, 19 S.W. 818, 111 Mo. 335.

**Sup. 1895.** Where the real issue is as to plaintiff's contributory negligence in attempting to board defendant's car, instructions are not objectionable because they do or do not recognize him as a passenger.—*Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W. 331, 128 Mo. 64.

**Sup. 1904.** In an action against a railroad company for injuries to a passenger, caused by falling on a greasy platform as he was stepping off a train which he had boarded, thinking it the train he wanted, defendant alleged that plaintiff was negligent in stepping off the train while in motion, and also in failing to make proper inquiry as to whether it was his train. The court instructed that, on proof of certain facts, plaintiff was entitled to recover, if not guilty of any want of ordinary care in stepping from the train. In another instruction the two acts pleaded by defendant as contributory negli-

gence were distinctly defined, and in still another the jury were told that, while it was the duty of defendant to furnish plaintiff information to enable him to find his train, it was also his duty to use ordinary diligence to obtain such information, and if defendant furnished such service, and plaintiff failed to avail himself of it, defendant was not responsible for his getting on the wrong train. *Held* that, taken as a whole, the instruction first quoted was not objectionable as limiting plaintiff's contributory negligence to one of the acts pleaded by the answer, and excluding the question of his negligence in not making proper inquiry for his train.—*Newcomb v. New York Cent. & H. R. R. Co.*, 81 S.W. 1069, 182 Mo. 687.

**Sup. 1907.** Where, in an action against a street railway company for injuries to a passenger received by his being knocked from the inner foot board by collision with a passenger on the inner foot board on a car going in the opposite direction, the issue as to plaintiff's contributory negligence was sharply presented by the pleadings, and there was substantial evidence introduced tending to establish plaintiff's negligence, it was proper to instruct that it was the plaintiff's duty in going upon the inner foot board to exercise such care as the position rendered reasonably necessary to prevent his being struck by passengers on the car, or by the car passing on the other track, and, if he could by standing upright thereon have avoided being struck by a passenger on or by the passing car and failed to do so, in consequence of which he was injured, he is not entitled to recover.—*Simonton v. St. Louis Transit Co.*, 106 S.W. 46, 207 Mo. 718.

**Sup. 1921.** In action for injuries to street car passenger, where the street railroad did not plead want of care or contributory negligence, instruction directing verdict for the passenger, without requiring the jury to believe that she was herself free from negligence, *held* proper, if such negligence did not appear in the passenger's own evidence as a matter of law.—*Scott v. Kansas City Rys. Co.*, 229 S.W. 178.

**Sup. 1922.** In a passenger's action for injuries sustained by being thrown from a street car by a violent jerk while alighting, a plea of contributory negligence that the injuries were caused by plaintiff's "own carelessness and negligence in attempting to alight from a moving street car," being a legal conclusion, *held* insufficient to warrant an in-

struction that plaintiff was not entitled to recover if he attempted to alight before the car came to a stop.—*Keppler v. Wells*, 238 S.W. 425.

**Sup. 1927.** Instruction authorizing finding that intending passenger would have crossed before approaching car, had it operated at usual speed, *held* proper under evidence.—*Sugarwater v. Fleming*, 293 S.W. 111, 316 Mo. 742.

**App. 1899.** An instruction in an action against a railway company for injuries sustained by a passenger, wherein the court presented to the jury the facts and circumstances tending to show that the passenger was not guilty of contributory negligence charged in the answer, averring that she jumped off the car in disregard of ordinary care, was not erroneous, as it did not direct a verdict for plaintiff on the facts assumed, while it would have been erroneous if it had directed such a verdict because of a failure to submit the issue as to the cause of action alleged in the petition.—*Choquette v. Southern Electric Ry. Co.*, 80 Mo. App. 515.

**App. 1903.** In an action against a street railway for injuries to a passenger, defendant set up in answer that plaintiff was injured by reason of his contributory negligence in jumping off a moving car at an unusual place. The court charged that if plaintiff had taken a position on the lower step of the rear platform of the car for his own convenience in getting off at a point beyond the railway tracks which they were crossing, and knew that the conductor had gone ahead to signal the car when to cross the tracks, and would again get on, he was guilty of contributory negligence if he did not exercise ordinary care to avoid a collision with the conductor when the latter was attempting to board the car. *Held*, that the charge was not warranted by the plea.—*Fleming v. St. Louis & S. Ry. Co.*, 74 S.W. 382, 101 Mo. App. 217.

**App. 1903.** Where in an action for injuries to a passenger the complaint alleged simple negligence only, an instruction that, though plaintiff was guilty of contributory negligence in attempting to alight at a place other than a street crossing or regular stopping place, such negligence would not bar a recovery if the car was started by the carrier's employés under such circumstances as showed a "reckless and willful" disregard for plaintiff's safety, was erroneous.—*Jacobson v. St. Louis Transit Co.*, 80 S.W. 309, 106 Mo. App. 339.

**App. 1906.** In an action for injuries to plaintiff while alighting from a street car, the court charged that if plaintiff was a passenger, and when the car stopped plaintiff undertook to alight, and while in the act of stepping from the platform, and before he had time to alight by using reasonable diligence and exercising ordinary care, the car was suddenly started by defendant's servants, whereby plaintiff was thrown to the pavement and injured, and defendant's servants failed to use the utmost skill and care which prudent men would use under similar circumstances to see that plaintiff had safely alighted from the car or was in a perilous position, plaintiff was entitled to recover. *Held*, that such instruction was not objectionable as eliminating the question of plaintiff's contributory negligence. —Hurley v. Metropolitan St. Ry. Co., 96 S.W. 714, 120 Mo. App. 262.

**App. 1912.** Where a boarding street car passenger claimed that after getting a foothold on a car he was not given time to reach a place of safety before the car passed a wagon standing in the street, and he was thereby injured, the negligence relied upon having no relation to the fact whether he attempted to board the car while in motion, it was error to instruct that, if he attempted to board while in motion, he could not recover. —Palfrey v. United Rys. Co. of St. Louis, 142 S.W. 773, 162 Mo. App. 470.

**App. 1926.** Submission of action against railroad for injuries received by plaintiff while attempting to enter a street car on last chance theory *held* warranted by petition. —Amos v. Fleming, 285 S.W. 134, 221 Mo. App. 559.

In action for injuries sustained by plaintiff on street car step not based on ordinary movement of car, instruction on assumption of risk *held* properly refused.—*Id.*

349. — **Verdict and findings.**

*See explanation, page iii.*

(F) **EJECTION OF PASSENGERS AND INTRUDERS.**

Application of rule of damages to case of negligent carrying beyond station, see ante, 271.

Exclusion from train, see ante, 277(5).  
From palace or sleeping cars, see post, 412, 416.

350. **Right of carrier in general.**

Right to eject from station as depending on relation as passenger, see ante, 247(2).

**Sup. 1903.** If a passenger places himself in such a position of danger that the carrier is unwilling to assume the duty of carrying him therein, the carrier has the right to require the passenger to leave the car.—Parks v. St. Louis & S. R. Co., 77 S.W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

**App. 1898.** Where plaintiff entered a train for passage to a town that did not habitually stop there, and was notified by the conductor as soon as he knew of the fact that he must leave the train at an intermediate station, and when the train reached such station he refused to leave it and was thereupon ejected with no more force than was necessary to accomplish this act, he was wrongfully on the train, and the conductor was authorized to eject him provided he acted in good faith and without malice.—Turner v. McCook, 77 Mo. App. 196.

**App. 1915.** A carrier *held* liable for the death of a passenger by being wrongfully ejected by the conductor from a moving train. —Iba v. Chicago, B. & Q. R. Co., 176 S.W. 491, 186 Mo. App. 718.

351. **Statutory regulation.**

Place of ejection, see post, 363.

352. **Liability of carrier for acts of employes.**

Ratification as ground for assessment of punitive damages, see post, 382.

**Sup. 1876.** Where, in an action against a railroad for ejection of a passenger, the evidence shows that to the conductor who ejected plaintiff was intrusted all authority which concerned the reception or ejection of passengers, the railroad will be *held* liable, though the ejection was an abuse of his authority.—Travers v. Kansas Pac. Ry., 63 Mo. 421.

**Sup. 1900.** Where plaintiff, a newsboy, sued a street railway company for injuries caused by a gripman's endeavoring to push him from the car on which he had jumped to sell papers, whereupon he dodged, and in doing so fell from the car and was injured, it was incumbent on plaintiff to allege and prove that the gripman's acts were within the scope of his duties, plaintiff not being a passenger, and in the absence of such allegation and proof plaintiff could not recover.—Raming v. Metropolitan St. Ry. Co., 57 S.W. 268, 157 Mo. 477.

**Sup. 1904.** The motorman of a street car, whose only duty is to operate the machinery,

was not within the scope of his employment in ejecting a boy who was trying to ride on the running board of the car.—*Drolshagen v. Union Depot R. Co.*, 85 S.W. 344, 186 Mo. 258.

**App. 1891.** A carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or service or not, if done during the course of the discharge of the servant's duties to the master which relate to the passenger.—*Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536.

**App. 1900.** A carrier is liable for the acts of his servants in wrongfully and wantonly assaulting a passenger and forcing him from the car.—*Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28.

**App. 1903.** Plaintiff was injured by being ejected from defendant's train while in motion, by a brakeman, although defendant's rules forbade brakemen to eject parties from trains while in motion, and without first securing from the conductor authority so to do. *Held*, that defendant was liable, as it was the brakeman's duty to eject trespassers, and in so doing he was in the course of his employment, and the fact that he acted contrary to the rules or exceeded his authority was no defense.—*Curtis v. Chicago, R. I. & P. Ry. Co.*, 73 S.W. 1103, 99 Mo. App. 502; *Id.*, 73 S.W. 1133, 99 Mo. App. 508.

**App. 1906.** A carrier was liable for a conductor's assault on a passenger who had been ejected from the car, the assault being incident to an effort to procure the passenger's arrest.—*McQuerry v. Metropolitan St. Ry. Co.*, 92 S.W. 912, 117 Mo. App. 255.

**App. 1908.** Where a passenger boarded a wrong train and insisted that she be allowed to ride on her ticket, the conductor was bound to treat her with respect and ordinary civility, whether or not he was right in his position; but that he told her she must pay her fare or leave the train, and when she demurred, indicated, by a gesture toward the bell rope, that he intended to eject her, and that, when she told him the brakeman directed her to take that train, he stated that the brakeman could not and would not dare to do such a thing, does not make the company liable to her; it appearing that she could not have been injured in the estimation of her fellow passengers by the latter remark, especially since the conductor summoned the brakeman, who justified the passenger, and

made it clear that she was the victim of his negligent mistake.—*Crutcher v. Cleveland, C., C. & St. L. R. R.*, 111 S.W. 891, 132 Mo. App. 311.

**App. 1909.** A brakeman on a freight train has not per se authority to eject a trespasser.—*Marcum v. Missouri, K. & T. Ry. Co.*, 122 S.W. 1148. See Railroads, 327 in this Digest.

**App. 1912.** A railroad company is liable for the willful and wanton acts of its servants who in ejecting one riding on its train illegally, but with consent of the conductor, injured him.—*McDonald v. St. Louis & S. F. Ry. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1918.** It is within the scope of the duty of a street car conductor to eject persons, whether passengers, licensees, or trespassers, from the car.—*Griffin v. Kansas City Rys. Co.*, 204 S.W. 826, 199 Mo. App. 682.

Though conductor ejected newsboy from car on account of ill will the railway was liable for injuries where such ill will grew out of a former conflict between the conductor and plaintiff which arose in the line of the conductor's duty.—*Id.*

### 353. Persons objectionable as passengers.

**App. 1920.** There must be something more than mere intoxication to justify a carrier in rejecting or ejecting a passenger.—*Abernathy v. Missouri Pac. R. Co.*, 217 S.W. 508.

### 354. Failure to procure ticket or pay fare.

Instructions, see post, 384.

Questions for jury, see post, 383.

### 355. — In general.

**Sup. 1873.** Plaintiff procured a ticket entitling him to transportation on defendant's road from W. to B., but upon entering the car refused to surrender his ticket until he was provided with a seat, and was thereupon ordered to leave the train when it should arrive at F. Having procured a seat at F., he tendered his fare from that point to B., but refused to surrender his ticket. The conductor refused to accept the amount offered, and ejected plaintiff from the train. *Held*, in an action for damages brought upon the original contract for transportation made at W., that plaintiff was not entitled to carriage from F. to B. without surrendering his ticket or tendering his fare from W. The case might be otherwise if plaintiff alleged a new contract

entered into at F.—*Davis v. Kansas City, St. J. & C. B. R. Co.*, 53 Mo. 317, 14 Am. Rep. 457.

**Sup. 1883.** Where a passenger boards a train which does not stop at the station to which he is going, he may be ejected for refusal to pay his fare for the distance beyond his destination.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663.

**Sup. 1886.** Where, in an action against a railroad company to recover damages for being ejected from one of its passenger trains, the undisputed facts proved on the trial show that the plaintiff had refused to pay his fare, a demurrer to the evidence will be sustained.—*Shular v. St. Louis, I. M. & S. R. Co.*, 2 S. W. 310, 92 Mo. 339.

The conductor of a train has a right to require a person to leave the train, who does not pay his fare.—*Id.*

**Sup. 1911.** A passenger who fails to purchase a ticket, and does not tender the proper fare upon request of the conductor, may be ejected.—*Tarrant v. St. Louis, I. M. & S. Ry. Co.*, 141 S.W. 600, 237 Mo. 655.

**App. 1879.** A carrier is liable for wrongfully ejecting a passenger, though its conductor honestly but mistakenly believed that the passenger had not paid his fare.—*State v. McDonald*, 7 Mo. App. 510.

**App. 1885.** Where plaintiff entered the caboose of a freight train without a ticket, with knowledge that the rules of the company prohibited passengers from riding on freight trains without tickets, he could not recover for an ejection, though the railroad company did not furnish facilities for the purchase of tickets for its freight trains, but such facilities were furnished in respect to passenger trains.—*Jones v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 158.

**App. 1894.** Where plaintiff was ejected from a freight train for failure to buy a ticket as required by the railroad company, of which requirement plaintiff had notice, but the ticket agent was not at the ticket office a reasonable time before the departure of the train so that plaintiff could buy a ticket, the railroad company was liable.—*Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 664.

**App. 1909.** If a passenger fails to deliver his ticket on the conductor's demand within a reasonable time, he may be ejected.—*Bolles v. Kansas City Southern Ry. Co.*, 115 S.W. 459, 134 Mo. App. 696.

A baggage check is no token of a passenger's right to transportation, and the conductor may eject the passenger on his refusal to present a ticket or pay fare.—*Id.*

**App. 1910.** A rule of a carrier that persons contemplating taking passage on a train must first buy a ticket must be enforced in a reasonable manner, and where a person sought to comply with the rule but could not do so because of the absence of the carrier's agent, the conductor could not eject him from the train after he had been notified of the inability to procure a ticket.—*Harkless v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 29, 151 Mo. App. 463.

**App. 1918.** Where plaintiff did not accept contract of carriage tendered to him by a street railroad by paying his fare or making unconditional tender thereof, railroad was not liable for ejecting him, unless conductor used unnecessary force.—*Green v. United Rys. Co. of St. Louis*, 206 S.W. 237, 200 Mo. App. 303.

**App. 1927.** Rule that railroad may eject passenger not tendering ticket or paying fare is not varied because passenger cannot produce ticket purchased.—*Boettler v. St. Louis-San Francisco Ry. Co.*, 300 S.W. 528.

### 356. — Defective or invalid tickets.

#### 356 (1). In general.

**Sup. 1877.** Where plaintiff's wife is ejected for refusing to pay her fare upon the refusal of the conductor to permit her to travel on a stock pass, which both she and plaintiff know to be invalid, plaintiff has no right of recovery.—*Brown v. Missouri, K. & T. Ry. Co.*, 64 Mo. 536.

**Sup. 1915.** Ticket which, by mistake, had no "going coupon" attached, held a valid and complete contract for the transportation for which it was bought.—*Ferguson v. Missouri Pac. Ry. Co.*, 177 S.W. 616.

**App. 1885.** A passenger, who knew at the time he entered a caboose that his ticket did not, under the regulations of the railroad then in force, entitle him to a passage therein, was properly ejected from the caboose, regardless of what the regulations in force at the time he purchased his ticket were.—*Claybrook v. Hannibal & St. J. Ry. Co.*, 19 Mo. App. 432.

**App. 1892.** In an action against a street railway company for the ejection of a passenger from a car, it appeared that plaintiff received a transfer and boarded the car to which he transferred at a place where pas-

sengers were customarily transferred; that in some manner his transfer had become torn in two and the conductor refused to receive it, and on his refusal to pay fare ejected him from the car. It also appeared that it was the custom of many passengers to tear their transfer checks in two pieces and throw them to the ground at the place of transfer, so that any one might pick them up, and that it was the rule of the carrier requiring a passenger attempting to ride on a transfer to present "a proper transfer check." *Held*, that such rule was reasonable, and the action of the conductor, in view of the rule, and circumstances, in refusing to accept the transfer as a proper transfer check under the rule, was warranted.—*Woods v. Metropolitan St. Ry. Co.*, 48 Mo. App. 125.

**App. 1893.** Plaintiff purchased a ticket from L. to G. good for 30 days with stop-over privilege at any point. He informed the conductor that he wished to get off at W., but the conductor tore off the going coupon and merely handed to plaintiff the return stub, which fact plaintiff did not notice. On the next day he got on at W. to resume his journey to G., but the conductor ejected him because he could not produce the going coupon. There was only one train a day each day and the same conductor was on the train. *Held*, that the ejection was wrongful.—*Cherry v. Kansas City, Ft. S. & M. Ry. Co.*, 52 Mo. App. 499.

**App. 1894.** A street car passenger, on leaving a car at a transfer point, obtained a transfer check which on its face provided that the check would be received only from passengers getting on the other line at that point. The cable on the latter line had temporarily stopped, and the passenger walked some blocks to where there was a train standing, which, had the cable been in motion, would have been one on which he could not have taken passage, because it had passed the transfer point before he reached it. He entered the train, and the conductor refused to accept the transfer check and ejected him on his refusal to pay fare. *Held*, that the passenger had no right of action for such ejection, for by accepting the transfer he consented to the regulations in respect to the place designated for entering the cars of the line on which the ticket entitled him to ride.—*Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 75.

←356 (2). Failure to comply with conditions of ticket.

**App. 1910.** Where plaintiff attempted to make a noncontinuous journey on a drover's pass, providing that it was good only for a

continuous trip, and, on the conductor's refusal to accept the pass, plaintiff refused to pay fare, though he was able to do so, he was properly ejected.—*Petty v. St. Louis & S. F. R. Co.*, 130 S.W. 85, 149 Mo. App. 360.

**App. 1912.** A street car passenger who obtains a transfer must inform himself of the manner in which it may be used, and where the rules require a resort to the most direct route to his destination, he cannot take a circuitous route and compel the acceptance of his transfer.—*Duke v. Metropolitan St. Ry. Co.*, 148 S.W. 166, 166 Mo. App. 121.

←356 (3). Time limit of ticket expired.

**Sup. 1877.** Plaintiff had bought from defendant a mileage ticket which contained a condition on the back thereof that it should not be good after six months from the date of its issuance. After the six months had expired plaintiff consulted an attorney, who gave it as his opinion that the ticket was still good, notwithstanding the condition on the back. Plaintiff thereupon boarded one of defendant's trains and offered the ticket, and upon a refusal thereof declined to pay the fare and was ejected by defendant's employes. It appeared from the evidence that plaintiff's only object in boarding defendant's train was to establish a cause of action against defendant for ejection. *Held*, that plaintiff was not a passenger.—*Lillis v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 464, 27 Am. Rep. 255.

**App. 1908.** Rev. St. 1899, § 1074 [Ann. St. 1906, p. 923], provides that, if a passenger refuses to pay his fare, the conductor of the train may eject him at any usual stopping place, or near any dwelling house. *Held* that, where plaintiff claimed a right to ride on an expired drover's pass which had been refused, and plaintiff had paid his fare to a division point, and thereafter was ejected by the conductor of the succeeding train because of his refusal to pay fare except with the pass, he was a trespasser as to whom the statute was inapplicable, and was properly ejected at a point not a usual stopping place, or near a dwelling house.—*Randolph v. Quincy, O. & K. C. R. Co.*, 107 S.W. 1029, 129 Mo. App. 1.

**App. 1909.** If a passenger's ticket has expired, the conductor may refuse it and eject the passenger on refusal to pay fare.—*Leyser v. Chicago, B. & Q. R. Co.*, 119 S.W. 1068, 138 Mo. App. 34.

←356 (4). Effect of mistake of employee issuing ticket.

**App. 1916.** Where, plaintiff purchased a round trip ticket, which, through the mistake

of the selling agent, contained no going coupon, and was told that unless it could be corrected she would have to leave the train, and was made to do so without violence or discourtesy, the railroad was liable for the ejection.—*Ferguson v. Missouri Pac. Ry. Co.*, 186 S.W. 1134.

—356 (5). **Effect of collateral agreement with ticket agent.**

*See explanation, page iii.*

—356 (6). **Persons on wrong train or carried past destination.**

**Sup. 1893.** In an action against a railroad company for compelling a passenger to get off the train before reaching destination, on the ground that the train did not stop there, proof that it sometimes stopped at that station is sufficient to show a wrongful ejection, and to put the burden on defendant to show that such stops were exceptional, and under special instructions.—*Sira v. Wabash Ry. Co.*, 21 S.W. 905, 115 Mo. 127, 37 Am. St. Rep. 386.

Where a train occasionally stops at a station, the carrier has the burden of showing that it was justified in ejecting a passenger destined for that station for refusal to pay additional fare on the failure of the train to stop to permit him to alight.—*Id.*

**App. 1886.** Plaintiff purchased of defendant railroad a ticket from the point where the purchase was made to L. and the ticket provided that it should be good only on trains stopping at L. Plaintiff boarded a train which did not stop at L. and was carried to M., an intermediate point, and the next day took a train from M., which train did stop at L., but the conductor on the latter train refused to accept his ticket and ejected him. *Held*, in an action for the wrongful ejection, that if the preceding conductor had so treated the ticket by punching it or by any other means as to make it appear that it had already been used from M. to L., and the last conductor from the face of the ticket could not have known that it had not been so used, plaintiff was rightfully ejected, but otherwise his ejection was wrongful.—*Kellett v. Chicago & A. R. Co.*, 22 Mo. App. 356.

**App. 1908.** Though a passenger holding a ticket over one carrier's line can recover from another carrier for any damages resulting directly from its brakeman's negligence in directing him to board its train, he is not entitled to free transportation on such train, and the conductor may properly refuse to accept such ticket, and eject the passenger

on his refusal to pay fare.—*Crutcher v. Cleveland, C. & St. L. R. R.*, 111 S.W. 891, 132 Mo. App. 311.

—356 (7). **Conclusiveness of ticket as between passenger and conductor.**

**App. 1910.** Before expelling a passenger from a train because of a defective ticket, the conductor was bound to ascertain that the ticket was not purchased from the company's agent as stated by the passenger, where it was apparently genuine.—*Ferguson v. Missouri Pac. Ry. Co.*, 128 S.W. 799, 144 Mo. App. 262.

—357. — **Extra fares or charges.**

**App. 1917.** Where a passenger requested information as to why the cash fare demanded of her was more than the usual fare, the conductor should have given her the desired information.—*Briggs v. Lusk*, 190 S.W. 380.

—358. — **Tender or payment of fare to avoid ejection.**

**Sup. 1874.** In an action for damages against a railroad company for ejecting plaintiff from defendant's cars, evidence that a friend of plaintiff offered to pay the amount claimed by the conductor while the latter was attempting to put plaintiff off of the train for refusal to pay his fare was not proper evidence to show that plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance.—*Perkins v. Missouri, K. & T. R. R.*, 55 Mo. 201.

**Sup. 1903.** Plaintiff applied to defendant's station agent for a ticket, laying down a \$10 bill in payment, and exhibiting a contract for a rebate on the purchase of a certain number of tickets, which entitled him to receive a credit certificate for each ticket bought. The agent prepared the ticket, but could not make the change. When the train arrived, he, in company with plaintiff asked the conductor to change the bill, explaining that plaintiff wished to purchase a ticket, and that he had a credential contract. The conductor refused to make the change, but told plaintiff he could get on the train. Afterwards he demanded plaintiff's fare, and plaintiff stated he wished his credit slip. After threats to eject plaintiff, the conductor jerked the bell cord, and the train began to slow up, whereupon plaintiff said he would pay his fare. Thereupon the conductor pulled the cord to go ahead. Plaintiff then asked him to "go through the train and then come back and see me," whereupon the conductor, grabbed him, and started towards the vestibule. Plaintiff offered evidence of a custom

among conductors to issue credit slips to passengers in such cases. *Held*, that if plaintiff, after the conductor attempted to eject him the second time, tendered his fare, it was the conductor's duty, under the circumstances, to accept it, and in ejecting him afterwards the company would be liable.—*Holt v. Hannibal & St. J. R. Co.*, 74 S.W. 631, 174 Mo. 524.

**App. 1901.** A passenger who on being threatened with ejection from the train for nonpayment of his fare offers to pay to avoid being ejected, but is nevertheless put off by the conductor, is entitled to recover.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

In an action for damages for being ejected from a train for nonpayment of fare, it appeared that plaintiff had a contract with defendant which entitled him to a rebate upon the purchase of a certain number of tickets, and to receive a credit certificate for each ticket bought until the sum specified for tickets was expended. Plaintiff offered to purchase a ticket from the station agent, tendering in payment a \$10 bill. The agent prepared the ticket, but found that he did not have sufficient money to make the proper change. He then proposed to wait until the train came in, when he would get the conductor to change the bill. The conductor refused to change the bill, but told plaintiff to get on the train. On demand for his fare plaintiff told the conductor that he wanted to be protected in paying his fare by getting a credit slip for the amount thereof to be used as a basis for rebate under his contract. This was refused by the conductor, and plaintiff was ejected after offering to pay his fare. *Held*, that defendant was liable.—*Id.*

**App. 1903.** Where a passenger on a street car tenders the exact amount of his fare, in legal-tender coin, the conductor has no right to refuse to accept it, and eject the passenger, though the coin was so worn as to lead the conductor to honestly believe that it was not a good one.—*Ruth v. St. Louis Transit Co.*, 71 S.W. 1055, 98 Mo. App. 1.

**App. 1903.** Where, on a carrier's threatened expulsion of a female passenger for refusal to pay fare except by a ticket which had expired, other passengers offered to pay the fare before the passenger was expelled, the carrier was bound to receive such money and transport the passenger.—*Randell v. Chicago, R. I. & P. Ry. Co.*, 76 S.W. 493, 102 Mo. App. 342.

**App. 1906.** Though a rule of a railroad required those riding on freight trains to produce tickets, where one was unable to procure a ticket because the station agent had none, but offered to pay fare, his ejection from the train by the conductor was wrongful.—*Gardner v. St. Louis & S. F. R. Co.*, 93 S.W. 917, 117 Mo. App. 138.

**App. 1907.** Where a tender of fare is made on behalf of a passenger prior to his ejection, in his presence or hearing, by a fellow passenger, and such tender is not repudiated by him, he will be presumed to have acquiesced in the effort so made in his behalf, so that proof of such fact was sufficient to sustain an allegation that his fare was duly tendered.—*Gates v. Quincy, O. & K. C. Ry. Co.*, 102 S.W. 50, 125 Mo. App. 334.

Where plaintiff, while intoxicated, boarded defendant's train without intending to pay fare, defendant's employés were not bound to accept a tender of fare from a third person and suspend plaintiff's ejection, after the process of ejection had commenced.—*Id.*

**App. 1908.** Where one who boards a train, intending to ride without payment of fare, refuses to pay fare when demanded, and the refusal is induced by bad faith the conductor, after attempting to eject him for nonpayment of fare, need not accept a tender of fare; but where one who boards a train, intending to pay fare, tenders his fare after refusing to pay, he cannot rightfully be ejected, though the tender is not made until steps have been taken to eject him.—*Beck v. Quincy, O. & K. C. R. Co.*, 108 S.W. 132, 129 Mo. App. 7.

**App. 1910.** The general rule is that unless a passenger tenders his fare on demand before the process of ejection is commenced, recovery will not be allowed, but in this state a distinction is made between a mere offer to pay fare and a tender thereof, and a mere offer to pay without an actual tender after process of ejection is commenced is unavailing.—*Short v. St. Louis & S. F. R. Co.*, 130 S.W. 488, 150 Mo. App. 359.

Though the conductor has signaled the engineer to stop the train and commenced the ejection of a passenger who merely offered to pay his fare without an actual tender thereof, his rights may be reinstated if he actually tenders payment before the ejection is complete.—*Id.*

Where, before boarding a train, an ejected passenger presented his ticket to the



brakeman whose duty it was to inspect it, and was passed into the train as if he held valid transportation, and the ticket itself did not suggest otherwise, he was justified in believing that it was good on the portion of the road on which he was traveling, and, so believing, he was within his legal rights when he parleyed with the conductor about the validity of his ticket, and did not tender the money for his fare on the first demand.—Id.

**App. 1918.** Plaintiff had no right to remain on street car without paying his fare on conductor's demand, or tendering it without condition as to issuance of transfer, even though he was legally entitled to such transfer.—*Green v. United Rys. of St. Louis*, 203 S.W. 237, 200 Mo. App. 303.

If plaintiff had paid defendant street railroad's conductor his fare, and then the conductor had refused to issue to him a transfer to which he was entitled, plaintiff would have had his remedy against the railroad.—Id.

Where plaintiff chose not to pay fare to street railroad because conductor would not first issue transfer, even though he was entitled to such transfer, it was his duty to leave car on first opportunity, when it had stopped at safe place, and to seek other redress.—Id.

Where passenger on street car conditioned tender of fare on issuance of transfer to which he was entitled, fact that conductor refused to issue transfer in any event, so that unconditional tender of fare would have been unavailing, did not prevent railroad from justifying ejection of plaintiff on theory unconditional tender of fare was not made.—Id.

### 359. Disobedience of carrier's rules.

Admissibility of evidence, see post, 381.  
Reasonableness as question for court or jury, see post, 383.  
Tickets, see ante, 354-358.

**App. 1892.** Where it was customary for a certain freight train operated by defendant company to carry passengers, although this was contrary to one of the company's rules, and plaintiff knew of such custom, and did not know of the rule, and entered the train for the purpose of going to a certain place, and was not notified that he could not ride on the train until after it had started, his expulsion from the train before reaching his destination and after having offered to pay his fare was wrongful.—*Burke v. Missouri Pac. Ry. Co.*, 51 Mo. App. 491.

**App. 1906.** A passenger is bound to observe and obey reasonable rules established for the convenience and comfort of other passengers, and, on his failure so to do, his ejection is warranted.—*McQuerry v. Metropolitan St. Ry. Co.*, 92 S.W. 912, 117 Mo. App. 255.

A prohibition of smoking in a street car is a reasonable rule.—Id.

**App. 1908.** A carrier having provided reasonable rules and regulations with respect to seating of passengers, it may employ necessary force to remove a passenger for persistent nonobservance of such rules.—*McLain v. St. Louis & G. Ry. Co.*, 111 S.W. 835, 131 Mo. App. 733.

**App. 1910.** Where a railroad passenger had no opportunity to exhibit his ticket before the train started but while mounting the steps of a car offered to show his ticket when he got in the car, he was improperly ejected.—*Cathey v. St. Louis & S. F. R. Co.*, 130 S.W. 130, 149 Mo. App. 134.

### 360. Disorderly conduct.

**App. 1891.** Where a passenger on a street car expressed a belief that the conductor had given him a mutilated coin, and the conductor expressed his opinion in an unoffensive manner, to the effect that he believed the coin a good one, and plaintiff, without being reasonably provoked, willfully, and in anger, called the conductor a liar in the presence and hearing of other passengers, he was guilty of disorderly conduct which would authorize his ejection.—*Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536.

**App. 1905.** Although a passenger on a street car has paid his fare, he cannot recover for ejection and arrest at the instance of the conductor, if he was guilty of the offense of disturbing the peace.—*Leonard v. St. Louis Transit Co.*, 11 S.W. 452, 115 Mo. App. 349.

### 361. Intruders and trespassers.

**App. 1907.** A street railway company owes to a trespasser on a car the duty of exercising ordinary care to prevent injury to him while removing him from the car.—*Drogmund v. Metropolitan St. Ry. Co.*, 98 S.W. 1001, 122 Mo. App. 154.

**App. 1908.** A passenger entering a train not stopping, under the rules of a company, at her destination, may not recover for being put off, on the theory of a wrongful ejection.

tion, except for the wrongful manner of the ejection, but must base any right to further damages on a misdirection by the carrier's servant to take such train.—*Drew v. Wabash R. Co.*, 107 S.W. 478, 129 Mo. App. 459.

### ←362. Acts constituting ejection.

**Sup. 1905.** For a passenger, whose ticket the conductor had refused to accept, to leave the train of her own accord, and against his advice that she remain, and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good, is not an ejection.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

The leaving of a train by a passenger whose ticket the conductor had refused to accept, in obedience to the conductor's command to the porter to see that she got off at the next station, is an ejection.—*Id.*

### ←363. Place of ejection.

Proximate cause of injury, see post, ←369. Questions for jury, see post, ←383.

**Sup. 1877.** Where a person enters a train knowing that the ticket which he intends to present in payment of his fare contains a condition that it shall not be good after six months from the date of its issuance, and that such six months have expired, and refuses to pay a fare upon the refusal of the conductor to take such ticket, he is a trespasser and he may be ejected from the train, although the train is not at a station or near a dwelling house, since *Wag. St. p. 307, § 28*, does not apply in such a case.—*Lillis v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 464, 27 Am. Rep. 255.

**Sup. 1883.** If a passenger has no legal right to demand that the train on which he has taken passage shall stop at the point to which his ticket entitles him to ride, and he refuses to pay his fare to the next stopping point beyond, he may be ejected at the next station preceding at which the train is permitted to stop.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 603.

**App. 1898.** Where a defendant railway company required a passenger to leave its train before arriving at her destination, at a place where there were no depot accommodations or where they were unreasonable and inadequate, and the passenger was thereby compelled to walk a long distance through mud and rain to a place of shelter, the railway company was liable for damages for

sickness and suffering incurred thereby.—*Spry v. Missouri, K. & T. Ry. Co.*, 73 Mo. App. 203.

**App. 1901.** Under Rev. St. 1899, § 1074, a passenger can only be put off a train for the reasons therein specified and in the manner therein prescribed when the train shall have been brought to a stop at one of its stations or near any dwelling house.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

**App. 1908.** Rev. St. 1899, § 1074 [Ann. St. 1906, p. 923], providing that, where any passenger shall refuse to pay his fare, the conductor may eject him at any usual stopping place or near any dwelling house, prohibits the ejection of a passenger for refusing to pay fare except at the places designated, and is violated where a conductor ejected from a train one who took passage intending in good faith to pay his fare, on his refusal to pay fare, notwithstanding his tender of fare after the ejection had commenced, where the conductor stopped the train at a spot distant from a residence or station; but, if the person took passage intending to ride without payment of fare, he was a trespasser, and not within the protection of the statute.—*Beck v. Quincy, O. & K. C. R. Co.*, 108 S.W. 132, 129 Mo. App. 7.

**App. 1910.** Where a passenger was ejected at a point where he could see a dwelling house "across the field," there was sufficient compliance with Rev. St. 1899, § 1074 (Ann. St. 1906, p. 923), providing that a passenger may only be ejected at a station or near a dwelling house.—*Petty v. St. Louis & S. F. R. Co.*, 130 S.W. 85, 149 Mo. App. 360.

**App. 1910.** Under Rev. St. 1899, § 1074 (Ann. St. 1906, p. 923), providing that if a passenger refuses to pay his fare, the conductor, using no unnecessary force, may put him out of the cars at any usual stopping place or near any dwelling house as he shall elect on stopping the train. *Held* that, under this statute, if one boards a train, knowing he is without means of paying his fare and with intention to "beat his way," he is a mere trespasser, and not protected by the statute which applies to passengers only, but it is otherwise if one without means of paying his fare, in good faith, honestly believes he has proper transportation, and enters with intention to hand his ticket or otherwise pay his fare, the ruling being that the matter must be determined from the intention of the patron of the carrier.—*Short v. St. Louis & S. F. R. Co.*, 130 S.W. 48, 150 Mo. App. 359.

**App. 1927.** Railroad was not liable where conductor ejected passenger for non-payment of fare without unnecessary force near dwelling house (Rev. St. 1919, § 9898).—*Boettler v. St. Louis-San Francisco Ry. Co.*, 300 S.W. 528.

364. **Manner of ejection in general.**

**Sup. 1877.** Though a passenger boards a train on which he is not entitled to ride, the conductor has no right to imperil his life by ejecting him while the train is running five or six miles an hour.—*Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588.

**Sup. 1909.** One who boards a street car with no intent to pay fare, and does not pay fare when requested, and who refuses to leave the car on demand, is a trespasser, and the company owes to him only the duty of not unnecessarily and intentionally injuring him.—*Garrett v. St. Louis Transit Co.*, 118 S.W. 68, 219 Mo. 65, 16 Ann. Cas. 678.

**App. 1907.** A boy 12 years old recklessly boarded a street car, while in motion, with the permission of the gripman. The conductor, while the car was in motion, ordered the boy to leave the car, and seized a broom and advanced toward him in a threatening manner, repeating the order to leave. The boy dodged, lost his equilibrium, and fell from the car. *Held*, that the company was liable for the injuries received; the act of the conductor being in disregard of the rule requiring him to exercise ordinary care to prevent injury to the boy.—*Drogmund v. Metropolitan St. Ry. Co.*, 98 S.W. 1091, 122 Mo. App. 154.

**App. 1907.** Though plaintiff boarded a train without the intention of paying fare, and hence did not become a passenger, the conductor was not entitled to put him off, regardless of the place or manner of his removal or the injuries he might receive.—*Gates v. Quincy, O. & K. C. Ry. Co.*, 102 S.W. 50, 125 Mo. App. 334.

**App. 1910.** A passenger cannot for any reason be ejected while the train is in motion and the carrier is liable where he is so ejected.—*Harkless v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 29, 151 Mo. App. 463.

**App. 1912.** The failure of the servants of a railroad company to use ordinary care to protect plaintiff whom they had ejected from a train from assaults of others *held* not to render company liable.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1914.** A passenger wrongfully ejected from a train may recover for unnecessary insult and humiliation by abusive language or conduct, though no unnecessary force is employed.—*Morris v. St. Louis & S. F. R. Co.*, 168 S.W. 325, 184 Mo. App. 65.

365. **Use of force, and resistance.**

Questions for jury, see post, 383.

365 (1). **Right to use necessary force.**

**Sup. 1877.** An employé of a railroad in ejecting a person for refusing to pay his fare has no right to use any more force than is necessary, but he has a right to use as much force as is necessary for the purpose of accomplishing the ejection.—*Lillis v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 464, 27 Am. Rep. 255.

**App. 1903.** The carrier is not liable to a passenger for assault and battery, who, from having used violent, boisterous, or profane language, or having been guilty of disorderly conduct in the presence of other passengers, is ejected from a street car by the conductor, using only such force as necessary for the purpose.—*Ickenroth v. St. Louis Transit Co.*, 77 S.W. 162, 102 Mo. App. 597.

**App. 1917.** Street railroad is not liable for ejecting passenger for wrongfully refusing to pay fare where its servants use only necessary force.—*Curran v. United Rys. Co. of St. Louis*, 196 S.W. 56, 197 Mo. App. 397.

365 (2). **Excessive force.**

**App. 1891.** In removing a passenger from a car for disorderly conduct, the servants of the carrier have no right to use any more force than reasonably necessary to accomplish their purpose.—*Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536.

**App. 1903.** Where a passenger refused to pay fare except by an expired ticket, and thereby became an intruder, and the carrier used more force and violence in expelling her from the train than was reasonably necessary, the carrier was liable for the injuries so inflicted.—*Randell v. Chicago, R. I. & P. Ry. Co.*, 76 S.W. 493, 102 Mo. App. 342.

**App. 1903.** The carrier is liable to a passenger, in an action for damages for assault and battery, who from bad conduct justifying his expulsion is expelled from a street car by the conductor, who used more force than necessary for the purpose.—*Ickenroth v. St. Louis Transit Co.*, 77 S.W. 162, 102 Mo. App. 597.

**App. 1906.** If it becomes necessary to eject a passenger because of his misconduct, no more force must be employed than is required to accomplish the removal.—*McQuerry v. Metropolitan St. Ry. Co.*, 92 S.W. 912, 117 Mo. App. 255.

Where a conductor in attempting to eject a passenger used excessive force, and assaulted the passenger, and followed him from the car, and ran after him, and, overtaking him, again assaulted him, there was a continuous assault, all of which was included within the exercise of excessive violence in the ejection.—*Id.*

**App. 1908.** Where a conductor on a train refused to accept plaintiff's ticket, and threatened to put him off if he did not pay his fare, and laid his hands so heavily on plaintiff as to cause pain and tend to put him in fear of further personal violence, it appearing that no force was necessary, the act was excessive, and would support an inference of malice.—*Glover v. Atchison, T. & S. F. Ry. Co.*, 108 S.W. 105, 129 Mo. App. 563.

**App. 1908.** A carrier is bound to accord to a trespasser on a train humane treatment, and cannot inflict brute violence on him, or employ more force than is needed to eject him; and ejecting him under circumstances indicative of inhumanity or reckless disregard of life may entitle him to an action.—*Beck v. Quincy, O. & K. C. R. Co.*, 108 S.W. 132, 129 Mo. App. 7.

**App. 1909.** If a passenger's ticket has expired, the conductor has no right to employ unnecessary force in ejecting him on refusal to pay fare, nor to assault and humiliate him with insulting, abusive, or threatening language.—*Leyser v. Chicago, B. & Q. R. Co.*, 119 S.W. 1068, 138 Mo. App. 34.

**App. 1912.** Where plaintiff, who was riding on one of defendant's trains, was assaulted by defendant's servants, who ejected him, it was liable for further assaults.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1918.** Though street railroad was entitled to eject plaintiff who refused to pay fare or tender it unconditionally, if conductor used unnecessary force, whereby plaintiff was injured, railroad is liable.—*Green v. United Rys. Co. of St. Louis*, 206 S.W. 237, 200 Mo. App. 303.

### ⇐365 (3). Resistance.

**App. 1910.** To make a railroad company liable for expelling a passenger, it is unneces-

sary that violence be used; it being sufficient that the passenger leave the train at the conductor's demand.—*Ferguson v. Missouri Pac. Ry. Co.*, 128 S.W. 799, 144 Mo. App. 262.

### ⇐366. Negligence in ejecting person under disability.

**Sup. 1913.** On a count alleging negligence in ejecting an intoxicated passenger, *held*, under the facts, that there could be no recovery.—*Hamilton v. Kansas City Southern Ry. Co.*, 157 S.W. 622, 250 Mo. 714.

**App. 1919.** Where street railway's motorman knew boy whom he was telling to leave car was on front steps, he should have stopped car to give boy an opportunity to alight, and in failing to take such means to prevent injuries to him after knowing his peril, he was negligent, and street railway was liable for injuries when boy slipped under wheels.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 103, 200 Mo. App. 585.

It was duty of street railway's servants to use ordinary care in removing from its car a trespassing 7 year old boy.—*Id.*

**App. 1919.** Where a street railway's conductor ordered a trespassing 7 year old boy off the car, and the boy went on the front steps to obey the order, the motorman was negligent in failing to protect the child by stopping the car or drawing him back.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 106, 200 Mo. App. 593, certiorari quashed State ex rel. *Metropolitan St. Ry. Co. v. Ellison* (Sup. 1920) 224 S.W. 820.

### ⇐367. Repayment of fare or return of ticket.

*See explanation, page iii.*

### ⇐368. Readmission after ejection.

*See explanation, page iii.*

### ⇐369. Proximate cause of injury.

**App. 1882.** Where a passenger was wrongfully put off a train in the night at a flag station, and at a point where he was unacquainted with the country, and while walking to the nearest place where he could get shelter he sustained an injury by falling through a cattle guard, the injury might be regarded as the proximate consequence of the wrong of putting him off the train.—*Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463.

### ⇐370. Contributory act or negligence of person ejected.

**Sup. 1877.** One who has boarded a train on which he is not entitled to ride is not guilty

of contributory negligence in stepping off the train in obedience to the order of the conductor while it is running six miles an hour, though he steps off backwards and is thrown to the depot platform and injured, since a passenger is not presumed to be acquainted with the laws of motion and momentum with mathematical accuracy.—*Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588.

**Sup. 1909.** Where, on a passenger's refusal to pay fare when demanded by the conductor, a fight ensued, which was brought on by the passenger or voluntarily entered into by him, during which he was thrown or fell from the car and received injuries causing his death, the carrier was not liable for the acts of the conductor.—*Garrett v. St. Louis Transit Co.*, 118 S.W. 68, 219 Mo. 65, 16 Ann. Cas. 678.

**App. 1903.** Where plaintiff's complaint in an action against a carrier for ejecting a female passenger was based on the use of excessive force and violence, amounting to willfulness, contributory negligence of the passenger in resisting her removal was no defense.—*Randell v. Chicago, R. I. & P. Ry. Co.*, 76 S.W. 493, 102 Mo. App. 342.

**App. 1915.** A passenger boarding a moving train is not guilty of positive wrong, and where he reaches a position of relative safety on the train he is entitled to the protection of a passenger.—*Iba v. Chicago, B. & Q. R. Co.*, 176 S.W. 491, 186 Mo. App. 718.

### 371. Companies and persons liable.

#### 372. — Carriers in general.

*See explanation, page iii.*

#### 373. — Connecting carriers.

Admissibility of evidence, *see post*, 381.

**App. 1895.** Defendant railroad company sold plaintiff a return trip ticket over its own line and that of an independent company. It did not mention such other road as contracting to carry plaintiff to the destination named and return, and recited that it would not be honored for return passage unless signed by the purchaser in the presence of the agent of defendant at destination. *Held*, that defendant was liable for the wrongful ejection of plaintiff on such other road.—*Cherry v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 303.

#### 374-379. *See explanation, page iii.*

#### 374. — Carrier's employes.

#### 375. Actions for wrongful ejection.

#### 376. — Nature and form.

#### 377. — Defenses.

#### 378. — Jurisdiction and venue.

#### 379. — Time to sue and limitations.

#### 380. — Pleading.

Conformity of instructions to pleadings, *see post*, 384.

#### 380 (1). Declaration, complaint, or petition.

**Sup. 1883.** Where an action is based upon an alleged ejection of plaintiff from defendant's train, other misbehavior of the conductor in ejecting plaintiff constitutes no cause of action and can only be considered in aggravation of damages in connection with an unlawful removal of plaintiff from the train. If the ejection was lawful, then, even of more force and violence than necessary were used, plaintiff cannot recover.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 603.

**App. 1898.** Where a petition showed that plaintiff was rightfully on a train and was carried by the station where he was to leave and wrongfully forced off at a point between stations and was not at fault in any manner, not having made a mistake in trains nor neglected to leave the train at his destination, the cause of action stated sounded in tort for the alleged willful conduct of defendant's servants, and it is of no importance as respects his right to recover damages thereunder as for a tort that the matters alleged in the petition included and involved a breach of contract of carriage.—*Book v. Chicago, B. & O. R. Co.*, 75 Mo. App. 604.

**App. 1898.** A complaint by a ticket holder for wrongful expulsion must allege that under the rules of the company the train on which plaintiff took passage was required to stop at the station named in his ticket.—*Turner v. McCook*, 77 Mo. App. 196.

Where the statement in an action for the wrongful expulsion of a passenger does not allege the misdirection of the servants of the defendant whose duty it was to direct passengers, so that plaintiff purchasing a ticket entered on the wrong train, but the expulsion of plaintiff by defendant's conductor as the ground of the action, the statement neither counts on the breach of contract for passage nor upon the negligent mistake of defendant's servant, and, therefore, states no cause of action, unless it be for the malicious expulsion.—*Id.*

**App. 1904.** In an action against a carrier for injury to plaintiff while a passenger,

where the petition charged that after plaintiff had paid his fare the "car proceeded to a point near the new City Hospital, where it was stopped by a blockade, and plaintiff, with other fellow passengers, was transferred to" another line operated by defendant, and that after plaintiff had entered the car on that line, "and was lawfully on the car, the conductor in charge assaulted him," it was error to deny defendant's motion to make the petition more specific as to the manner in which the transfer to the second car was effected, and the facts under which he claimed to be lawfully on the car.—*Ruebsam v. St. Louis Transit Co.*, 83 S.W. 984, 108 Mo. App. 437.

**App. 1908.** The petition of a passenger claiming a wrongful ejection other than the manner of the ejection must allege that the train under the rules of the carrier was required to stop at the station named in her ticket.—*Drew v. Wabash R. Co.*, 107 S.W. 478, 129 Mo. App. 459.

**App. 1910.** A petition in an action against a carrier for an assault by a brakeman, which alleges that plaintiff went on the steps of the carrier's train and that while there, preparatory to entering a coach, the brakeman struck him, knocked him off the steps and against the depot platform, injuring him, stated a cause of action for an assault committed on plaintiff, and the allegation that he was a passenger at the time was unnecessary, so that the failure to prove it did not defeat a recovery, for the brakeman's act, in willfully and with unnecessary force striking plaintiff in ejecting him from the train, though the carrier was not liable for an act of the brakeman in forcibly preventing plaintiff from entering the train, unless more force was used than was reasonably necessary.—*Adams v. St. Louis & S. F. R. Co.*, 130 S.W. 48, 149 Mo. App. 278.

☞ 380 (2). **Plea or answer.**

*See explanation, page iii.*

☞ 380 (3). **Reply.**

*See explanation, page iii.*

☞ 380 (4). **Issues, proof, and variance.**

**Sup. 1883.** A ticket is not a contract for transportation, and in an action for ejection of plaintiff from one of defendant's trains defendant has the right to show that plaintiff had no right to a passage on the train from which he was ejected by reason of rules and regulations of the company, although

rules and regulations were not pleaded.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663.

**Sup. 1900.** Where a petition against a street railway company for injuring a newsboy alleged that the gripman pushed plaintiff from the car, and the evidence showed that the gripman first shoved at him with a broom, and then struck at him with his hand, in neither case touching him, and that plaintiff fell from the car in dodging the threatened blow, such evidence does not correspond with the allegation, and it was error by overrule a demurrer thereto.—*Raming v. Metropolitan St. Ry. Co.*, 57 S.W. 268, 157 Mo. 477.

**App. 1888.** In an action against a railroad for injuries resulting from plaintiff's wrongful ejection from the train, defendant can introduce no evidence on the issue of contributory negligence without having pleaded it.—*St. Clair v. Missouri Pac. Ry. Co.*, 29 Mo. App. 76.

In an action against a railroad for injuries to a passenger alleged to have been compelled by the conductor to jump from the train, defendant could prove under the general issue that plaintiff voluntarily jumped from the train.—*Id.*

**App. 1894.** In an action against a street railway company to recover damages sustained by a passenger by reason of being ejected for his refusal to pay fare on the conductor refusing to accept a transfer check because the passenger had not entered the car at the transfer point, as required by the conditions of the transfer check and the regulations of the company, evidence tending to establish the regulation requiring the passengers obtaining a transfer check to enter the car at the transfer point is admissible without being specially pleaded.—*Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 75.

**App. 1903.** Where, in an action for injuries to a person in her removal from a railroad train for failure to pay fare, the essence of the complaint was the excessive force and violence used in the expulsion, a variance, if any, between the petition, alleging her to have been a passenger, and the proof, that she was an intruder only, was immaterial.—*Randell v. Chicago, R. I. & P. Ry. Co.*, 76 S.W. 493, 102 Mo. App. 342.

**App. 1906.** Where, in an action against a carrier, the petition charged that defendant's servants assaulted plaintiff, drove him from the car, and knocked him down upon the streets of the city, and there was evidence

tending to show that the first assault committed by the conductor was all over when the plaintiff left the car, and that it was several minutes before the conductor started to look for an officer and as incident to such search committed another assault, it was error to instruct the jury in effect that they might find for plaintiff, either under the hypothesis that the assault was continuous, or that two separate assaults were made.—*McQuerry v. Metropolitan St. Ry. Co.*, 92 S. W. 912, 117 Mo. App. 255.

**App. 1908.** Where the complaint alleged that defendant street railroad company's conductor wrongfully refused to accept a transfer tendered by plaintiff, a passenger, accused the latter of attempting to defraud the company, and maliciously ejected plaintiff from the car, and that after plaintiff paid his fare and reboarded the car the conductor thereafter continued the charge in the presence of passengers that plaintiff had attempted to defraud defendant, the scope of the cause of action was broad enough to include insults offered during the entire period of transportation, and hence evidence as to what the conductor said after plaintiff returned to the car was admissible.—*White v. Metropolitan St. Ry. Co.*, 112 S.W. 278, 132 Mo. App. 339.

**App. 1916.** Elements of damage not pleaded in an action for damages for excluding plaintiff from its train and procuring his arrest under a false charge of intoxication may not be shown.—*Davis v. Chicago, R. I. & P. Ry. Co.*, 182 S.W. 826, 192 Mo. App. 419.

**App. 1919.** In action against street railway for injuries to plaintiff's son, petition alleging boy was on step of car in a position of peril, under such allegation it was competent to prove he was attempting to alight as an incident of being on the step.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 106, 200 Mo. App. 593, certiorari quashed State ex rel. *Metropolitan St. Ry. Co. v. Ellison* (Sup. 1920) 224 S.W. 820.

### 381. — Evidence.

#### 381 (1). Presumptions and burden of proof.

**Sup. 1903.** The burden was on defendant, a railroad company, sued for ejecting a passenger, to sustain its defense that he had refused to pay his fare, etc.—*Holt v. Hannibal & St. J. R. Co.*, 74 S.W. 631, 174 Mo. 524.

**Sup. 1909.** One suing a street railway company for the death of a person ejected

from a car by the conductor, and basing his right to recover on the ground that decedent was a passenger and criminally assaulted by the conductor, must show not only that decedent was killed by the conductor, but that he was a passenger.—*Garrett v. St. Louis Transit Co.*, 118 S.W. 68, 219 Mo. 65, 16 Ann. Cas. 678.

**App. 1901.** In an action to recover damages for being ejected from a train for nonpayment of his fare, the burden is on defendant to prove the happening of the contingency upon which it acquires the right to eject the passenger under Rev. St. 1899, § 1074.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

**App. 1904.** Malice may be inferred from the wrongful doing of a wrongful act, such as expulsion by the conductor of a street car, without explanation or excuse, of a passenger who presents a proper transfer, but refuses to pay cash fare.—*Summerfield v. St. Louis Transit Co.*, 84 S.W. 172, 108 Mo. App. 718.

Where transfers were received by a passenger from a street car conductor in response to a request made in due course for proper transfers, it would be presumed, in the absence of evidence to the contrary, that they were proper tokens of transfer, and entitled the passenger to passage on the car to which he transferred, and that the conduct of the conductor of that car in refusing to receive them in lieu of cash fares was unwarranted.—*Id.*

**App. 1910.** Under Rev. St. 1899, § 1074 (Ann. St. 1906, p. 923), authorizing the ejection of passengers for nonpayment of fare or offensive conduct, the burden is on a railroad company sued for ejecting a passenger to show ejection on a statutory ground.—*Ferguson v. Missouri Pac. Ry. Co.*, 128 S.W. 799, 144 Mo. App. 262.

A railroad company sued for ejecting a passenger had the burden of showing that the ticket was not legal, and that the conductor was not authorized to receive it, where the ticket was evidently genuine.—*Id.*

#### 381 (2). Admissibility in general.

**Sup. 1874.** In an action for ejecting plaintiff from defendant's cars, evidence that he had made an ineffectual attempt to procure a ticket before entering the car is admissible to show his good faith in getting aboard without his ticket.—*Perkins v. Missouri, K. & T. R. R.*, 55 Mo. 201.

**Proof of the retention of a conductor by the company after his malicious ejection of a passenger from a car is admissible in showing such a ratification of his act as, under Wag. St. p. 307, § 28, will render the company liable.—Id.**

**Sup. 1877.** The statement of a railroad operator to a passenger who has missed the first section of a freight train on which he was authorized to ride, that he could take the second section, as it was considered a part of the same train, was admissible to show the good faith of such passenger in boarding the second section, from which he was ejected, though the operator had no authority to permit passengers to ride on trains.—*Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588.

**Sup. 1883.** In an action by a passenger for damages for his ejection from a train of defendant's cars, it was error for the court to refuse to permit defendant to prove the rules and regulations of the company, and the information given to plaintiff by the ticket agent when plaintiff purchased his ticket, that he must not get on that particular train because it did not stop at the point of plaintiff's destination.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663.

**Sup. 1910.** Where, in an action for the death of a passenger while on the track after his wrongful ejection from a train, the evidence on the issue whether the passenger intended to become a passenger by paying fare was conflicting, evidence of the conduct of the passenger in taking a train immediately before entering the train from which he was ejected and riding thereon without payment of fare was admissible.—*Powell v. St. Louis & S. F. R. Co.*, 129 S.W. 963, 229 Mo. 246.

**App. 1894.** Where there is a question as to the reasonableness of the regulation adopted by a street railway company, that passengers leaving a car at a transfer point and obtaining there a transfer check for another line must get on the latter line at the transfer point, it is error to exclude evidence to the effect that the only way the company can protect itself in the operation of its several lines of railway against imposition is to require that the passenger receiving a transfer check shall get on the other line at the transfer point.—*Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 75.

**App. 1895.** In an action for wrongful ejection of a passenger wherein the defense was that it was done on a road operated by

an independent company, a folder showing that defendant operated such road, but dated subsequent to the ejection, was improperly admitted in evidence.—*Cherry v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 303.

Where in an action for wrongful ejection of a passenger the defense was that it was done on a road operated by an independent company, a map which was issued prior to the ejection, showing that defendant operated such road, was admissible.—Id.

**App. 1902.** In an action against a railroad company for injuries sustained by a lady passenger as a result of being wantonly pushed by defendant's conductor from the platform of a car, where no effort was made by plaintiff to impeach the conductor as a witness, evidence offered by the defendant as to the conductor's general character, and his conduct towards lady passengers in particular, was properly excluded.—*Berger v. Chicago, & A. Ry. Co.*, 71 S.W. 102, 97 Mo. App. 127.

**App. 1903.** A passenger, in an action against a carrier for a wrongful ejection, may not give evidence as to his character, it not being attacked.—*Breen v. St. Louis Transit Co.*, 77 S.W. 78, 102 Mo. App. 479.

**App. 1910.** In an action for the ejection of a passenger, where there was no evidence that the action of the conductor in putting plaintiff off the train was vindictive or violent, and the court so ruled and instructed the jury that plaintiff was not entitled to punitive damages, the admission of evidence that the conductor talked "angry," to the introduction of which no objection was made, was not error.—*Truel v. Missouri, K. & T. Ry. Co.*, 128 S.W. 223, 143 Mo. App. 380.

**App. 1910.** In an action against a street railroad for the ejection of plaintiff who boarded a car not in service for carriage of passengers, evidence that plaintiff had previously had trouble with the men in charge of such cars, and claimed he had a right to ride on them, was admissible on the issue of punitive damages.—*Hermann v. St. Joseph Ry., Light, Heat & Power Co.*, 129 S.W. 414, 144 Mo. App. 147.

#### ←381 (3). Regulations and customs.

**Sup. 1903.** Evidence was admissible, in an action for ejection of passenger, that it was a custom among conductors of defendant's road to issue to passengers on payment of cash fares credit slips on contracts like



the one exhibited by plaintiff.—*Holt v. Hannibal & St. J. R. Co.*, 74 S.W. 631, 174 Mo. 524.

**App. 1901.** In an action for damages for being ejected from a train for nonpayment of fare, it appeared that plaintiff had a contract with defendant which entitled him to a rebate upon the purchase of a certain number of tickets, and to receive a credit certificate for each ticket bought until the sum specified for tickets was expended. Plaintiff offered to purchase a ticket from the station agent, tendering in payment a \$10 bill. The agent prepared the ticket, but found that he did not have sufficient money to make the proper change. He then proposed to wait until the train came in, when he would get the conductor to change the bill. The conductor refused to change the bill, but told plaintiff to get on the train. On demand for his fare plaintiff told the conductor that he wanted to be protected in paying his fare by getting a credit slip for the amount thereof to be used as a basis for rebate under his contract. This was refused by the conductor, and plaintiff was ejected after offering to pay his fare. *Held*, that evidence tending to prove that it was the usual custom and habit of conductors on defendant's road to issue to passengers, upon payment of cash fares, credit slips upon contracts like plaintiffs, was admissible.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

—381 (4). **Weight and sufficiency.**

**App. 1902.** In an action against a railroad company for injuries sustained by a passenger as a result of being wantonly pushed from a car by a conductor, evidence examined, and *held* to support a finding for plaintiff.—*Berger v. Chicago & A. Ry. Co.*, 71 S.W. 102, 97 Mo. App. 127.

**App. 1906.** In an action against a carrier for a wrongful ejection from a train, evidence *held* sufficient to warrant a finding that the conductor was actuated by malice.—*Gardner v. St. Louis & S. F. R. Co.*, 93 S.W. 917, 117 Mo. App. 138.

**App. 1910.** In an action against a street railroad for ejection of plaintiff who boarded a car not in service for the carriage of passengers, evidence *held* sufficient to sustain a finding that unnecessary force was used.—*Hermann v. St. Joseph Ry., Light, Heat & Power Co.*, 129 S.W. 414, 144 Mo. App. 147.

**App. 1910.** In an action for ejecting a passenger from a train, his evidence *held* to show the ejection was wrongful.—*Short v. St.*

*Louis & S. F. R. Co.*, 130 S.W. 488, 150 Mo. App. 359.

**App. 1912.** In an action by one injured by the servants of a railroad company, evidence *held* to show that at the time the assaults were begun the servants of the company were acting within the scope of their authority in ejecting plaintiff.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1918.** Evidence *held* to show that conductor in ejecting newsboy from street car was acting within the scope of his authority.—*Griffin v. Kansas City Rys. Co.*, 204 S.W. 826, 199 Mo. App. 682.

**App. 1919.** In boy's action against street railway for injuries when ordered off moving car, evidence *held* to show motorman knew boy was on front step after having been told to get off, and in a position of peril.—*Quirk v. Metropolitan St. R. Co.*, 210 S.W. 103, 200 Mo. App. 585.

**App. 1925.** Evidence *held* to warrant submitting question of punitive damages for conduct in ejecting plaintiff.—*Hillebrand v. Wells*, 270 S.W. 402.

—382. — **Damages.**

Admissibility of evidence, see ante, —381(2).

—382 (1). **Measure and elements in general.**

**Sup. 1915.** Carrier's ejection of woman passenger tendering a valid ticket *held* an independent tort, making it liable in damages for physical pain, discomfort, delay, and indignity.—*Ferguson v. Missouri Pac. Ry. Co.*, 177 S.W. 616.

**App. 1894.** An instruction in an action for ejection from a freight train, that if the jury find for plaintiff they will assess his damages at such sum as they believe he has sustained, and in determining such sum shall take into consideration the place where he was put off the train, the condition of the weather, the manner in which he was ejected, and his sickness and suffering, if any, caused by being so ejected, is sufficient.—*Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 664.

**App. 1895.** In an action by a passenger for wrongful ejection, the jury was properly instructed to assess plaintiff's damages at such sum, not exceeding \$1,000, as would reasonably compensate him for the money paid out to finish his journey, and for the trouble and inconvenience caused him by reason of

being ejected from the car, and for the injury to his feelings, if any, including humiliation, insult, and indignity caused by reason of being ejected.—*Cherry v. Kansas City, Ft. S. & M. Ry. Co.*, 61 Mo. App. 303.

**App. 1903.** The honest expression of opinion by a conductor that money offered to him for fare is counterfeit, and his refusal to accept it on that account, he not charging that the passenger knew it was counterfeit, is not a tort, or an element of damages for the wrongful ejection of the passenger.—*Breen v. St. Louis Transit Co.*, 77 S.W. 78, 102 Mo. App. 479.

**App. 1906.** In an action for wrongfully ejecting plaintiff from a train, an instruction authorizing the jury to assess plaintiff's damages at such sum as they believed would fairly compensate him for any pain of body and mind suffered by him as a result of the wrongful act of defendant's conductor in ejecting him was proper.—*Williams v. St. Louis, M. & S. E. R. Co.*, 96 S.W. 307, 119 Mo. App. 663.

**App. 1908.** Where a passenger is wrongfully ejected from a train by the conductor, without unnecessary force or violence, willfulness, or malice, but in good faith, under the mistaken belief that he is not entitled to ride, he may recover for all the inconvenience, loss of time, labor, and expense incurred by him in consequence of the ejection, but not for mental suffering or humiliation, nor can he recover punitive damages; but, where unnecessary force is used, or abusive or insulting language, malice is presumed, and the rule as to damages is otherwise.—*Glover v. Atchison, T. & S. F. Ry. Co.*, 108 S.W. 105, 129 Mo. App. 563.

**App. 1916.** Plaintiff, wrongfully put off defendant's train at about night when it was cold and rainy and obliged to stay over night at a hotel, could not recover for loss of time or hotel expenses, etc., paid by her husband, but might recover for the delay in her journey, and the inconveniences and distress incident to her ejection.—*Ferguson v. Missouri Pac. Ry. Co.*, 186 S.W. 1134.

**App. 1916.** Where a passenger is wrongfully ejected from a train, the carrier is liable for damages which might reasonably be expected to flow from the ejection, together with damages for humiliation and mental distress.—*Davis v. Lusk*, 190 S.W. 362.

Where a passenger is wrongfully ejected from a train on a rainy night and takes a

cold, such cold is a consequential damage directly flowing from the wrongful act.—*Id.*

#### 382 (2). Nominal or substantial damages.

**Sup. 1903.** Rev. St. 1899, § 1074, provides that, if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him out of the cars on stopping the train. *Held*, that a railroad in ejecting a passenger while the train is in motion is at least liable for nominal damages.—*Holt v. Hannibal & St. J. Ry. Co.*, 74 S.W. 631, 174 Mo. 524.

**App. 1900.** Where a passenger is carried beyond his station to which he has paid his fare and is violently put off at a place remote from any station, he may recover substantial damages.—*Book v. Chicago, B. & Q. Ry. Co.*, 85 Mo. App. 76.

**App. 1901.** A passenger who is ejected for the nonpayment of his fare from a train while in motion, contrary to the provisions of Rev. St. 1899, § 1074, is entitled to nominal damages, irrespective of any injury sustained.—*Holt v. Hannibal & St. J. R. Co.*, 87 Mo. App. 203.

#### 382 (3). Physical injuries.

**App. 1903.** In estimating damages for the wrongful and forcible ejection of a passenger, his physical pain, though slight, and his mental suffering naturally resulting may be considered.—*Breen v. St. Louis Transit Co.*, 77 S.W. 78, 102 Mo. App. 479.

#### 382 (4). Fear, humiliation, and mental suffering.

**Sup. 1905.** Though a railroad ticket presented by a passenger does not entitle her to passage, so that, on her being informed of its invalidity and refusing to pay fare, the conductor may remove her, the company is liable for compensatory damages for his using unnecessary and insulting language to her, injuring her feelings and humiliating her.—*Boling v. St. Louis & S. F. R. Co.*, 88 S.W. 35, 189 Mo. 219.

**App. 1886.** In estimating the damages caused to a passenger by mistreatment from the conductor, the jury may consider his wounded feelings and mental suffering.—*McGinnis v. Missouri Pac. Ry. Co.*, 21 Mo. App. 399.

**App. 1900.** Where, in an action to recover for the wrongful ejection of plaintiff from a passenger train, the evidence did not disclose that the ejection resulted in any bodily

injury, or was accompanied by circumstances of malice, insult, or inhumanity, the jury in estimating the damages were not authorized to include therein an allowance for pain of mind.—*Snyder v. Wabash R. Co.*, 85 Mo. App. 495.

**App. 1907.** Where a passenger presents a transfer entitling him to passage, which is refused, and on his refusal to pay fare he is ejected from the car, he is not limited to a recovery of the amount of the fare demanded, but is entitled to have considered as an element of damages his shame and mortification from a public expulsion from the car.—*Carmody v. St. Louis Transit Co.*, 99 S.W. 495, 122 Mo. App. 338.

**App. 1907.** Plaintiff, a girl six years of age, was put aboard defendant's street car for transportation to another town, with a memorandum as to where she was going pinned to her dress. The conductor, on ascertaining that she had no fare, ejected her in the outskirts of the town and left her by the side of the track. The conductor informed the conductor of the car going in the opposite direction that he had better take up the plaintiff and take her back to the street where she boarded the car. The day was bleak and wintry and when the conductor of the latter car found plaintiff she was very cold and frightened. Plaintiff was thereafter taken to her parents by a stranger. *Held*, that the conductor's act in ejecting plaintiff was willful and inhuman, and justified a recovery for fright and mental suffering, though plaintiff suffered no bodily hurt.—*Harless v. Southwest Missouri Electric Ry. Co.*, 99 S.W. 793, 123 Mo. App. 22.

**App. 1910.** Where a conductor wrongfully and wantonly ejected a passenger from a moving train, causing him to sustain physical injuries, the carrier was liable to compensate him for mental suffering and humiliation.—*Harkless v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 29, 151 Mo. App. 463.

**App. 1914.** A passenger wrongfully ejected from a train may recover compensatory damages for mental anguish caused by abusive, insulting, and humiliating language accompanying the ejection, though no physical injury was inflicted.—*Morris v. St. Louis & S. F. R. Co.*, 168 S.W. 325, 184 Mo. App. 65.

**App. 1916.** Damages for humiliation and mental distress caused by wrongful ejection of a passenger from a train may be recovered, although there is no contemporaneous physical injury.—*Davis v. Lusk*, 190 S.W. 362.

**App. 1917.** Where a street car conductor forcibly and wrongfully ejects a passenger and abuses him, he may recover compensatory damages for mental suffering.—*Hart-ridge v. United Rys. Co. of St. Louis*, 196 S.W. 59.

Where a street car conductor wrongfully ejects a passenger and insults him, the jury in assessing compensatory damages for mental suffering may consider the force used, application to plaintiff of word "liar," and insinuation that he was trying to beat his way.—*Id.*

**App. 1918.** Where plaintiff went upon street car to demand his rights in relation to obtaining transfer or compelling railroad to put him off, unnecessary force in his ejection having been used, he cannot recover for humiliation.—*Green v. United Rys. Co. of St. Louis*, 206 S.W. 237, 200 Mo. App. 303.

382 (5). **Aggravation, mitigation, and reduction of loss.**

**App. 1887.** Where a passenger who was forcibly ejected from defendant's train went out into the storm and stayed out in it during the entire night, leaving the shelter of the station and neglecting the shelter of the farm houses along his route, the damages thus sustained he inflicted upon himself, and for them he has no right to recover. The fact that he had no money with him was no justification for such conduct under the proof.—*Corrister v. Kansas City, St. J. & C. B. R. Co.*, 25 Mo. App. 619.

**App. 1898.** Where a passenger was compelled to leave defendant's train before reaching her destination, she could not recover for damages from sickness and suffering resulting from walking a long distance to a place of shelter, if there were adequate and reasonable accommodations for passengers at the point where she was compelled to leave the train, as she could not enhance damages by injury caused by her own act.—*Spry v. Missouri, K. & T. Ry. Co.*, 73 Mo. App. 203.

**App.** Where a passenger is rightfully on a car, and tenders lawful money for his fare, which is refused on the claim that it is counterfeit, he is not required to leave the car, but may resist ejection so far as to make it manifest that he is being put off by expulsion.—(1903) *Breen v. St. Louis Transit Co.*, 77 S.W. 78, 102 Mo. App. 479; (1904) *Breen v. Same*, 83 S.W. 998, 108 Mo. App. 443.

**App. 1904.** Where a passenger was ejected from a car after tendering lawful

money, which was refused, in good faith, on the claim that it was counterfeit, in an action for the ejection it was proper to refuse an instruction that if, by paying other money or leaving the car, he could have avoided the mortification of a public expulsion, he subjected himself to the mortification and it was not to be considered in estimating the damages for the expulsion.—*Breen v. St. Louis Transit Co.*, 83 S.W. 908, 108 Mo. App. 443.

**App. 1904.** Where the wrongful ejection of a passenger from a street car is accompanied by insulting language on the part of the conductor, the same is proper matter in aggravation of damages.—*Osteryoung v. St. Louis Transit Co.*, 84 S.W. 179, 108 Mo. App. 703.

**App. 1910.** A passenger whose ticket is wrongfully rejected by the conductor need not minimize his damages by paying fare.—*Ferguson v. Missouri Pac. Ry. Co.*, 128 S.W. 799, 144 Mo. App. 262.

#### ←382 (6). Exemplary damages.

**Sup. 1877.** Where, in an action to recover damages for the ejection of plaintiff's wife, it appears that the wife was attempting to travel on a stock pass which both she and plaintiff knew to be invalid, and it was shown to be plaintiff's intention to pay his wife's fare as soon as he was satisfied that she could not proceed on the train without doing so and he could get the conductor to put her off, the allowance of punitive damages is improper.—*Brown v. Missouri, K. & T. Ry. Co.*, 64 Mo. 536.

**Sup. 1877.** Where a stock pass presented by a shipper of cattle to the conductor of a passenger train plainly showed on its face that plaintiff was entitled to ride thereon until January 19th, a verdict for exemplary damages for his ejection from a train on his presentation of the pass on January 12th would not be disturbed.—*Graham v. Pacific R. Co.*, 66 Mo. 536.

**Sup. 1878.** Plaintiff and her two infant children had tickets for transportation on defendant's train. The conductor in violent, unbecoming, and insulting language threatened to eject her from the train and sent a brakeman to execute the threat, which he did by taking one of the children and carrying it off, thus forcing plaintiff to follow with the remaining child. *Held*, that warrant the allowance of punitive damages by the jury.—*Hicks v. Hannibal & St. J. R. Co.*, 68 Mo. 320.

**Sup. 1883.** If defendant's conductor acted in good faith with no malice toward plain-

tiff, and used only such force as was necessary to eject him from defendant's train, although mistaken as to his duty and plaintiff's right, it is no case for vindictive damages.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663.

**App.** Where a conductor of a railroad train in ejecting a passenger acted in good faith and with no malice toward the passenger, and used only such force as was necessary to eject him, although the conductor was mistaken as to his duty, the passenger was not entitled to recover vindictive damages.—(1885) *Claybrook v. Hannibal & St. J. Ry. Co.*, 19 Mo. App. 432; (1886) *Kellett v. Chicago & A. R. Co.*, 22 Mo. App. 356.

**App. 1888.** Where a railroad conductor acted wantonly and recklessly and disregarded of the life and limb of a passenger in compelling him to jump from the train, punitive damages were properly allowed.—*St. Clair v. Missouri Pac. Ry. Co.*, 29 Mo. App. 76.

**App. 1889.** In an action by a passenger for wrongful ejection from defendant's car by a conductor and gripman, it was apparent from the testimony that defendant did not directly, or by any circumstance, ratify the action of its servants, but that, on learning of the conductor's conduct, it discharged both him and the gripman from its service. It did not appear that defendant had any knowledge of misbehavior of its servants at any other time. *Held*, that defendant was not liable for exemplary damages.—*Rouse v. Metropolitan St. Ry. Co.*, 41 Mo. App. 298.

**App. 1900.** In an action by a passenger for injuries sustained by being assaulted by the carrier's servant, it appeared that the carrier after knowledge of the willful conduct of the servant retained him in his employment. *Held*, that the carrier thereby ratified the servant's wanton act and became liable to punitive damages.—*Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28.

**App. 1902.** In an action against a railroad company the evidence of plaintiff, if true, established the allegations of her petition that the defendant's conductor spoke harshly to her, a passenger, and wantonly pushed her off a car platform onto the ground. *Held*, that plaintiff was entitled to an instruction as to punitive damages.—*Berger v. Chicago & A. Ry. Co.*, 71 S.W. 102, 97 Mo. App. 127.

**App. 1904.** Punitive damages may be allowed for the wrongful act of a street car

conductor in evicting a passenger from his car without justification, excuse, or explanation, and in willful disregard of the passenger's rights as evidenced by a proper transfer ticket, although no actual force was used.—*Sumnerfield v. St. Louis Transit Co.*, 84 S. W. 172, 108 Mo. App. 718.

**App. 1906.** In an action against a railroad for wrongfully ejecting plaintiff from defendant's train, evidence that the assault on plaintiff by defendant's conductor was unprovoked, and the conduct of the conductor wanton, reckless, and malicious, justified the assessment of punitive damages.—*Williams v. St. Louis, M. & S. E. R. Co.*, 96 S.W. 307, 119 Mo. App. 663.

**App. 1908.** Plaintiff, accompanied by a woman, boarded defendant street railroad company's car and tendered the conductor transfers in payment of fare. The conductor refused to accept the transfers, saying that they were worthless, accusing plaintiff of trying to defraud defendant threatening to put him off unless the fares were paid. Plaintiff thereupon paid the woman's fare, but refused to pay his own, and the conductor seized him and pushed him off the car, saying that he could not return without paying the fare. Plaintiff paid the fare and returned to the car, but the conductor continued to treat him in an insolent manner, saying: "Well, I put you off, didn't I? You feel a little better now, don't you?" etc. *Held*, that a verdict of \$250 punitive damages was not excessive.—*White v. Metropolitan St. Ry. Co.*, 112 S.W. 278, 132 Mo. App. 339.

**App. 1909.** Where a conductor was unreasonably peremptory in demanding a passenger's ticket and immediately ejected him, the passenger was entitled to recover his actual damages, and, if it was accompanied by unnecessary physical force and insulting language, or either, he was entitled to punitive damages.—*Bolles v. Kansas City Southern Ry. Co.*, 115 S.W. 459, 134 Mo. App. 696.

If a railway passenger, acting on the belief that he had failed to obtain his ticket from the agent, while leaving the train voluntarily was assaulted and insulted by the conductor, he could recover actual and punitive damages.—*Id.*

If plaintiff was rightly required by a railway conductor to leave the train and no physical force was used, he could not recover punitive damages.—*Id.*

**App. 1909.** Where the ejection of a passenger is known to be not only wrongful, but

malicious, punitive damages may be assessed.—*Leyser v. Chicago, B. & Q. R. Co.*, 119 S.W. 1008, 138 Mo. App. 84.

**App. 1909.** Where a freight brakeman ordered plaintiff to get off a freight train which plaintiff had boarded under the impression that it carried passengers, and, when plaintiff started down the ladder of a car to get off when the train slowed up, the brakeman commenced throwing coal at him, striking him on the head and arm, and after plaintiff had jumped off the brakeman again threw a lump of coal, which struck plaintiff and injured him, the court did not err in authorizing exemplary damages.—*Marcum v. Missouri, K. & T. Ry. Co.*, 122 S.W. 1148, 139 Mo. App. 217.

**App. 1910.** Where a brakeman cursed and abused a person who had gone on the steps of a passenger train to go to his destination, and called him a vile name while assaulting him, punitive damages were properly awarded.—*Adams v. St. Louis & S. F. R. Co.*, 130 S.W. 48, 149 Mo. App. 278.

**App. 1910.** The evidence of plaintiff suing a carrier for his wrongful ejection from a train that the train was in motion, that the conductor forcibly unclinked plaintiff's hands from the bars of the car to which he was holding and pushed him backward while the train was in motion, causing injuries, justified the award of punitive damages.—*Harkless v. Chicago, R. I. & P. Ry. Co.*, 132 S.W. 29, 151 Mo. App. 463.

**App. 1912.** Where plaintiff with his wife boarded defendant's train not knowing that it did not stop at the station called for by his tickets, and the conductor addressed him in a loud tone which called the attention of the other passengers thereto and brought plaintiff under suspicion as a wrongdoer, and put him off one-half mile from his station, *held* that he was entitled to punitive damages.—*Distler v. Missouri Pac. Ry. Co.*, 147 S.W. 518, 163 Mo. App. 674.

**App. 1915.** One wrongfully excluded from a train cannot recover punitive damages where the exclusion was not malicious.—*Malloy v. St. Louis, I. M. & S. Ry. Co.*, 178 S.W. 224.

**App. 1917.** Where a street car conductor forcibly ejects a passenger willfully without legal justification, excuse, or provocation, he may recover punitive damages.—*Hartbridge v. United Rys. Co. of St. Louis*, 196 S.W. 59.

**App. 1918.** Plaintiff, who invited ejection from street car which he had boarded to

test rights in matter of transfers, having been ejected with unnecessary force on refusing to pay fare or make tender thereof not conditioned on issuance of transfer, could recover punitive damages.—*Green v. United Rys. Co. of St. Louis*, 206 S.W. 237, 200 Mo. App. 303.

←382 (7). **Inadequate or excessive damages.**

**Sup. 1917.** In a passenger's action against a railroad for ejection after his refusal to pay more than the legal fare, verdict of \$500 punitive damages *held* not so excessive as to indicate passion or corruption.—(1915) *Smith v. Atchison, T. & S. F. R. Co.*, 180 S.W. 1036, 192 Mo. App. 210, decision of Supreme Court (1916) *State v. Ellison*, 186 S.W. 1075, 268 Mo. 225, conformed to and judgment reversed 194 S.W. 71.

**App. 1904.** In an action for injuries from an assault by defendant's conductor in evicting plaintiff from a car, a verdict for \$50 actual damages to plaintiff is not so inadequate as to warrant the court, on appeal, in setting aside a judgment based on the verdict, where the evidence was conflicting on the question of the justification of the conductor's action in putting defendant off the car for drunkenness and disorderly conduct, and plaintiff's injuries were not attended by serious results.—*Meyer v. St. Louis & S. Ry. Co.*, 83 S.W. 267, 108 Mo. App. 220.

**App. 1906.** Where, in an action against a railroad for wrongfully ejecting plaintiff from defendant's train, plaintiff testified that the blow inflicted upon his head by defendant's conductor caused him a great deal of pain and was still the source of frequent headaches, and the evidence showed that the assault on plaintiff by the conductor was unprovoked, and that the conduct of the conductor was wanton, reckless, and malicious, a verdict for plaintiff for \$400 as compensatory damages and \$150 as punitive damages, was not excessive nor indicative that the jury was influenced by passion or prejudice.—*Williams v. St. Louis, M. & S. E. R. Co.*, 96 S.W. 307, 119 Mo. App. 663.

**App. 1910.** Where, in an action for ejection of a passenger who was not permanently injured, wherein it might have been found from the evidence that the conductor was rude and angry, and with the brakeman ejected plaintiff with force before the train actually came to a stop, and that plaintiff was slightly injured by a sprain in the hip, was compelled to walk over three miles to a station, and was delayed a day in reaching his destination, and owing to the conductor's

omission to return the ticket given him on the train, he was compelled to buy a new ticket at about \$1.80, an award of \$100 actual damages and \$300 punitive damages was not excessive.—*Short v. St. Louis & S. F. R. Co.*, 130 S.W. 488, 150 Mo. App. 359.

**App. 1914.** A verdict for \$500 for the wrongful ejection of a female passenger, accompanied by abusive and humiliating language, is not excessive.—*Morris v. St. Louis & S. F. R. Co.*, 168 S.W. 325, 184 Mo. App. 65.

**App. 1916.** Verdict of \$500 for damages for the wrongful ejection of a passenger causing a delay in her journey, and incidental mental distress, *held* excessive, and not allowed to stand unless reduced to \$75.—*Ferguson v. Missouri Pac. Ry. Co.*, 186 S.W. 1134.

**App. 1916.** A verdict for \$750 for ejection of passenger from a train *held* excessive under the evidence.—*Davis v. Lusk*, 190 S.W. 362.

**App. 1925.** \$1,000 damages for injury to nose and soreness over vertebra for assault excessive to extent of \$500.—*Hillebrand v. Wells*, 270 S.W. 402.

←383. — **Questions for jury.**

**Sup. 1893.** Whether a regulation of a railroad company which excluded a woman from a car set apart for ladies merely on account of color, the facts being undisputed, was a reasonable one, was a question of law to be determined by the court, and in submitting it as a question of fact to the jury the court committed error.—*Chilton v. St. Louis & I. M. Ry. Co.*, 21 S.W. 457, 114 Mo. 88, 19 L. R. A. 269.

**Sup. 1895.** The fact that a railway company has been accustomed to throw mail sacks from its trains while in motion in a certain manner, and that during such time no one had been injured thereby, does not as a matter of law prevent the throwing of a sack in the same manner, whereby a passenger on its platform is injured, from being negligent.—*Hughes v. Chicago & A. R. Co.*, 30 S.W. 127, 127 Mo. 447.

**Sup. 1910.** In an action for the death of a passenger, while on the track after wrongful ejection from a train, evidence *held* to authorize submission to the jury of the issues whether plaintiff boarded the train with the intention of becoming a passenger, and whether, before the trainmen attempted to eject him, he tendered his fare to his destination.—*Powell v. St. Louis & S. F. R. Co.*, 129 S.W. 963, 229 Mo. 246.

**Sup. 1913.** In an action against a railroad company and a conductor for being kicked off a freight train by the conductor after plaintiff had paid his fare, whether the conductor kicked plaintiff off, and whether he acted within the line of his employment in the company's business in ejecting plaintiff *held* jury questions.—*Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S.W. 1009, 252 Mo. 438, judgment affirmed (1915) *Chicago, R. I. & P. R. Co. v. Whiteaker*, 36 S. Ct. 152, 239 U. S. 421, 60 L. Ed. 360.

**App. 1882.** Where a passenger is wrongfully put off a train at night, in the midst of a wintry storm, 80 miles from where he started and 200 from where he was going, it was proper, in an action for such ejection, to permit the jury to say whether such act was wanton, reckless, and oppressive, so as to warrant the imposition of exemplary damages.—*Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463.

**App. 1886.** In an action against a railroad for misconduct toward a passenger on account of an apparent alteration of his ticket, the evidence *held* to make a case for the jury whether the acts of the conductor were not insulting as alleged.—*McGinnis v. Missouri Pac. Ry. Co.*, 21 Mo. App. 399.

**App. 1894.** Plaintiff went to defendant's depot at the time of the arrival of a freight train and there was no one there but a boy sweeping out the office, who told him the agent had gone home. After waiting plaintiff inquired again with the same answer, when plaintiff went aboard the train. The agent testified that he was around the depot all the time, but did not see the plaintiff, and that the boy had authority to sell tickets. It did not appear that plaintiff knew the boy or that he had authority to sell tickets. *Held*, in an action for ejection from the train for failure to procure a ticket, that the case was one for the jury.—*Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 664.

**App. 1897.** In an action against a railway company for injuries sustained by plaintiff by being thrown from a moving train by a brakeman, evidence examined, and *held* sufficient to require submission to the jury of the question whether the brakeman at the time he ejected plaintiff was acting in the scope of his employment, making the company liable, though plaintiff was a trespasser.—*Brennan v. Santa Fé Receivers*, 72 Mo. App. 107.

**App. 1903.** Defendant had honored a passenger's ticket, which had expired, for a

distance of nearly 500 miles, until the train arrived at B., where a change of conductors was made. The conductor refused to accept the ticket, and demanded the passenger's fare, which she was unable to pay. The conductor permitted her to ride past a number of stations, when, without notifying her of his intention, he procured a negro policeman, of extraordinary stature and strength, armed with a club, and directed him to eject the passenger, which he did with violence. *Held*, that whether or not defendant used excessive force in expelling such passenger and whether such acts were wanton and willful, were for the jury.—*Randell v. Chicago, R. I. & P. Ry. Co.*, 76 S.W. 493, 102 Mo. App. 342.

**App. 1906.** Where, in an action for ejection of a passenger from a street car for alleged nonpayment of fare, plaintiff's evidence showed that though he offered no resistance to being ejected from the car except by catching hold of the hand rails to prevent himself from being thrown off, and that the conductor used excessive force, struck plaintiff, and stamped on his feet, it was proper to submit the question of punitive damages to the jury.—*Madigan v. St. Louis Transit Co.*, 93 S.W. 316, 117 Mo. App. 118.

**App. 1907.** In an action for ejection of a passenger from a car, an instruction that the jury "should" find exemplary damages, if they found the ejection willful, was erroneous, the question of exemplary damages being wholly for the jury.—*Carmody v. St. Louis Transit Co.*, 99 S.W. 495, 122 Mo. App. 338.

**App. 1908.** Whether a passenger, who, being put off the train at a station other than hers, walked the rest of the night in the rain to her station, was justified in so doing, so as to be entitled to recover, as part of her damages, for her resulting sickness, is a question for the jury; she testifying that she was without money to pay for hotel accommodations or for transportation, and knew no one in the place.—*Drew v. Wabash R. Co.*, 107 S.W. 478, 129 Mo. App. 459.

**App. 1908.** In an action to recover for ejection from a train by the conductor, evidence *held* sufficient to take to the jury the issues whether the conductor resorted to unnecessary force or was guilty of insulting language or conduct.—*Glover v. Atchison, T. & S. F. Ry. Co.*, 108 S.W. 105, 129 Mo. App. 503.

In an action for the wrongful ejection of a passenger, evidence on the issue whether

the ejection was accompanied by insult and abuse *held* one of fact for the jury.—*Id.*

**App. 1908.** Whether one, suing a carrier for wrongful ejection from a train, boarded the train intending to pay his fare, and was therefore a passenger, or boarded the train intending to ride without paying fare, and was therefore a trespasser, *held*, under the evidence, for the jury.—*Beck v. Quincy, O. & K. C. R. Co.*, 108 S.W. 132, 129 Mo. App. 7.

Where, in an action against a carrier for wrongfully ejecting plaintiff from a train, plaintiff testified that on his tendering the fare, after he had first refused to pay fare, the conductor said that it was too late, and that he had been waiting for an opportunity to expel plaintiff from the train, and the conductor testified that he had had trouble with plaintiff before about fares, and was a "little sore" at plaintiff, and there was evidence that the conductor, after refusing to accept plaintiff's tender of fare, threw him violently off the train at a place distant from a residence or station, the question of malice on the part of the conductor was for the jury.—*Id.*

**App. 1908.** Evidence *held* sufficient to warrant the submission to the jury of the question whether defendant street railroad's conductor, in ejecting plaintiff, a passenger, from a car, was insulting and abusive in his language and demeanor and acted with malice.—*White v. Metropolitan St. Ry. Co.*, 112 S.W. 278, 132 Mo. App. 339.

**App. 1910.** In an action against a carrier for wrongful ejection of a passenger, right to punitive damages *held* to be for the jury under the evidence.—*Short v. St. Louis & S. F. R. Co.*, 130 S.W. 488, 150 Mo. App. 359.

In an action for wrongful ejection of a passenger, his good faith in entering the car *held* to be for the jury under the evidence.—*Id.*

**App. 1912.** Whether the first assault upon one who was ejected from a railroad train was begun by the railroad company's servants while acting within the scope of their employment should be submitted to the jury.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1914.** In an action against a carrier for damages because of being ejected from a train, it was error to submit to the jury the question whether the ticket called for a continuous passage.—*Igon v. St. Louis & S. F. R. Co.*, 168 S.W. 647, 184 Mo. App. 187.

**App. 1915.** In an action for negligent death of a passenger, evidence *held* to authorize submission to the jury of the issue of liability, based on the conductor ejecting him.—*Iba v. Chicago, B. & Q. R. Co.*, 176 S.W. 491, 186 Mo. App. 718.

**App. 1917.** In an action for damages for wrongfully ejecting a passenger from a street car, it is for the jury to determine under all the circumstances of the case whether the acts were maliciously done, and malice need not be expressly proven.—*Hartridge v. United Rys. Co. of St. Louis*, 196 S.W. 59.

**App. 1918.** In action against street railroad for wrongful ejection from car, though conductor had right to eject because plaintiff did not pay fare or unconditionally tender it, plaintiff was entitled to go to jury on issue of unnecessary force.—*Green v. United Rys. Co. of St. Louis*, 206 S.W. 237, 200 Mo. App. 303.

**App. 1919.** In boy's action for injuries, when ejected from defendant street railway's car as it was moving, question whether or not proximate cause of his getting off was the order of the conductor, or of the motor-man, *held* for the jury.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 103, 200 Mo. App. 585.

**App. 1919.** It was not necessary for plaintiff to show anything more than that his son was on steps of defendant street railway's car, that he was a boy of 7, and that the car was moving at 7 to 10 miles an hour, to permit him to go to jury on question whether boy was in position of peril, such as on discovery by railroad's servants required them to stop or take boy back out of danger.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 103, 200 Mo. App. 593, certiorari quashed State ex rel. *Metropolitan St. Ry. Co. v. Ellison* (Sup. 1920) 221 S.W. 820.

**App. 1928.** Evidence of inhuman conduct of conductor in putting 14 year old plaintiff off train, boarded by mistake, *held* insufficient for jury.—*Bennett v. St. Louis-San Francisco Ry. Co.*, 7 S.W.(2d) 1028.

### ⚡384. — Instructions.

#### ⚡384 (1). In general.

**Sup. 1867.** In an action for negligence in expelling the plaintiff from the defendant's car, whereby he was run over and injured, it is error in the court to instruct the jury that if they believe the defendant's agent was about to expel the plaintiff he should first have stopped the cars, for such an instruction



withdraws the whole question of negligence from the jury. The court cannot single out an isolated fact, and instruct that it amounts to negligence as matter of law.—*Meyer v. Pacific R. R.*, 40 Mo. 151.

**Sup. 1877.** Instructions in action by shipper of cattle for wrongful ejection from passenger train.—*Graham v. Pacific R. Co.*, 66 Mo. 536.

**App. 1894.** In an action for ejection from a freight train, where there was no evidence that plaintiff was not a passenger, an instruction that, if plaintiff boarded the train as a passenger, etc., is not subject to the objection that it submitted to the jury the question of law as to whether plaintiff was a passenger.—*Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 664.

**App. 1906.** In an action for wrongfully ejecting plaintiff from defendant's car, an instruction that it was the duty of the railroad to protect its passengers from rude, boisterous, or unseemly conduct on the part of other passengers, and from annoyance by profane, obscene or vulgar language, and that if, at the time defendant's conductor compelled plaintiff to leave the car, plaintiff was rude, or was using profane, or vulgar language in the presence of other passengers, the conductor did no more than he was authorized to do, sufficiently informed the jury of defendant's duty to protect its passengers, and of the right of the conductor to enforce such protection.—*Williams v. St. Louis, M. & S. E. R. Co.*, 96 S.W. 307, 119 Mo. App. 663.

**App. 1907.** A boy 12 years old boarded a street car with the permission of the gripman, who had no authority to permit him to do so. The conductor, while the car was in motion, ordered the boy to leave, and seized a broom and advanced toward him in a threatening manner, repeating the order. The boy dodged, lost his equilibrium, fell from the car, and was injured. *Held*, that the court properly refused to charge that as the boy was not a passenger, it was the duty of the conductor to prohibit him from riding and if the boy stepped from the car at the command of the conductor there could be no recovery for the act of the conductor was in violation of the rule requiring him to exercise ordinary care to prevent injury to the boy though he was a trespasser.—*Drogmund v. Metropolitan St. Ry. Co.*, 98 S.W. 1091, 122 Mo. App. 154.

**App. 1907.** In an action for ejection and arrest of a passenger the modification of a re-

quested instruction that the plaintiff must show by a preponderance of the evidence that the carrier had expressly authorized its agent or agents to cause the arrest by adding the words "or impliedly" after the word "expressly" was not prejudicial to the carrier.—*Car-mody v. St. Louis Transit Co.*, 90 S.W. 495, 122 Mo. App. 838.

**App. 1908.** In an action against a carrier for wrongful ejection of plaintiff from a train, an instruction that, if plaintiff offered to pay his fare after he had refused to pay and the conductor had signaled the train to stop to remove plaintiff, a subsequent offer to pay fare did not entitle plaintiff to be carried on the train, was not in conflict with a charge which made the right of plaintiff to continue on the train after he had failed to pay his fare when first demanded to depend on his subsequent tender of fare; an offer to pay fare, not accompanied by a tender of the money, being insufficient to put the conductor in the wrong in going on with the expulsion.—*Beck v. Quincy, O. & K. C. R. Co.*, 108 S.W. 132, 129 Mo. App. 7.

**App. 1912.** In an action against a carrier for assault while ejecting plaintiff from a train, an instruction that defendant was liable if its servants assaulted plaintiff at or immediately after he left the train was misleading as authorizing a recovery for assault not commenced while the servants were acting within the scope of their employment.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

An instruction that if defendant's servants ejected plaintiff, and in doing so, or immediately thereafter, wrongfully assaulted him, defendant was liable, was correct as requiring the assault to have been commenced during the process of ejection.—*Id.*

**App. 1919.** In action against street railway for injuries to trespassing boy forced off front steps of car by motorman, instruction on last clear chance, which concluded that plaintiff was entitled to recover if jury found that, while trying to alight, he fell as a direct result of negligence of street railway, *held* not erroneous, as permitting plaintiff to recover on any theory of negligence.—*Quirk v. Metropolitan St. R. Co.*, 210 S.W. 103, 200 Mo. App. 585.

384 (2). Applicability to pleadings and issues.

**App. 1888.** In an action against a railroad for injuries caused by plaintiff's wrong-

ful ejection from the train on which he was a passenger, an instruction authorizing a finding for plaintiff if he was "forced or compelled" to jump from the train, whereas the petition only charged that he was compelled so to do, was not erroneous.—*St. Clair v. Missouri Pac. Ry. Co.*, 29 Mo. App. 76.

**App. 1894.** While an instruction that, if plaintiff went to defendant's ticket office shortly before the departure of the train and the ticket agent was absent, the conductor had no right to expel plaintiff for failure to procure a ticket, is subject to criticism in the use of the word "shortly," and conflicts with an instruction that the ticket agent is required to be at his office only a reasonable time before the departure of the train, yet where the evidence shows that plaintiff went to the ticket office only ten minutes before the departure of the train, and found the agent absent, the defendant was not prejudiced by such instruction.—*Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 614.

In an action for ejection from a freight train, where there was no substantial evidence that plaintiff was not put off near a dwelling house, as required by Rev. St. 1889, § 2581, the evidence being that plaintiff did not see the house, an instruction that, if plaintiff was not put off at a usual stopping place or near a dwelling house, the finding should be for plaintiff, was prejudicial.—*Id.*

**App. 1900.** Where the petition alleged that plaintiff was a passenger and charged the carrier's servants with forcing him from the car by wantonly and wrongfully assaulting him, an instruction that, though plaintiff might have conducted himself so offensively as to justify the carrier's servants in putting him off the car, yet if the servants used more force in doing so than was reasonably necessary, the carrier was liable, was not objectionable, as outside of the issues raised by the petition, since the removal of plaintiff by excessive force, evidenced by violence and unnecessary beating, was unlawful.—*Tanger v. Southwest Missouri Electric Ry. Co.*, 85 Mo. App. 28.

**App. 1902.** An instruction including shame and humiliation as an element of damages was proper, though it was not specifically pleaded, nor was any direct testimony on that point given.—*Berger v. Chicago & A. Ry. Co.*, 71 S.W. 102, 97 Mo. App. 127.

**App. 1903.** In an action against a street railway company, the complainant alleged

that plaintiff had refused to pay his fare until the car had passed a dangerous curve, plaintiff at the time the fare was demanded having hold of a rail to keep from being thrown from the car, and being incumbered with packages, but that the conductor threw him from the moving car, which allegations were sustained by plaintiff's testimony, and the answer alleged that on refusal to pay his fare the conductor had put plaintiff off without unnecessary force, which theory was sustained by the conductor's testimony. The court instructed that if the jury found that plaintiff refused to pay his fare the conductor had a right to put him off, but had no right to use any more force than necessary, nor to subject him to injury by pushing him off while the car was moving; and, if the conductor violently pushed him from the car when it was moving so rapidly as to throw him to the ground and injure him, plaintiff was entitled to recover. *Held*, that the instruction was not open to the objection that it permitted a recovery on a different cause of action from that stated in the petition.—*Gotwald v. St. Louis Transit Co.*, 77 S.W. 125, 102 Mo. App. 492.

**App. 1904.** In an action against a carrier for ejection of a passenger, where the complaint embraced no charge of want of care by the conductor, but alleged that plaintiff's expulsion was wantonly effected, it was error to charge that if the jury found that the conductor used unnecessary force, and "carelessly" or wantonly injured plaintiff, their verdict should be for the plaintiff.—*Ruebsam v. St. Louis Transit Co.*, 83 S.W. 984, 108 Mo. App. 437.

**App. 1904.** Where a petition in an action against a street railroad company alleged that the conductor of defendant's car, on which plaintiff was a passenger, assaulted plaintiff and ejected him from the car and abused him—calling him profane names in a loud voice—an instruction authorizing the jury to find for plaintiff if the conductor cursed plaintiff and called him vile names was erroneous, as authorizing a recovery for mere words, unaccompanied by physical violence, which was not counted on as an independent cause of action.—*Osteryoung v. St. Louis Transit Co.*, 84 S.W. 179, 108 Mo. App. 703.

**App. 1907.** Evidence that a road officer of a street railroad company threatened a passenger with the controller handle of the car and that the passenger was forcibly removed from a seat near the front of the car to the back platform, was sufficient to justify

an instruction as to the company's liability if its servants threatened and put the plaintiff in peril of his life, and of great bodily harm, and compelled him to leave the car.—*Carmody v. St. Louis Transit Co.*, 99 S.W. 495, 122 Mo. App. 338.

**App. 1914.** In an action for wrongful ejection, defended on the ground that, plaintiff's ticket calling for a shorter route, defendant could not under the Interstate Commerce Act transport him the longer route on the ticket, it was error to instruct that the jury could consider the fact that on other occasions plaintiff had been transported over the same route by a like ticket.—*Ligon v. St. Louis & S. F. Ry. Co.*, 168 S.W. 647, 184 Mo. App. 187.

**App. 1919.** In action against street railway for injuries to boy trespassing on car, when ordered by conductor and motorman to leave, instruction on theory that conductor ordered boy off while car was in motion, and that motorman negligently failed to stop car to permit boy to alight, *held* to follow petition as construed.—*Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 103, 200 Mo. App. 585.

#### 384 (4). Damages.

**Sup. 1915.** On circumstances of plaintiff's ejection by defendant railroad company, *held*, that instruction on exemplary damages was not warranted.—*Ferguson v. Missouri Pac. Ry. Co.*, 177 S.W. 616.

In action for wrongful ejection of passenger, instruction that plaintiff could only recover actual damages which would reasonably compensate for trouble and inconvenience *held* erroneous, as not including all matters of recovery.—*Id.*

On evidence in action for damages for ejection from defendant's train, instruction as to damages for lost time *held* erroneous.—*Id.*

**App. 1882.** In an action by a passenger for damages sustained owing to his having been put off a train, the court instructed that, if the conductor, in compelling plaintiff to leave his train, acted in a wanton, reckless, or oppressive manner, they might give exemplary damages. *Held*, that the language should not be understood as referring to the words used and the means employed by the conductor, but as referring to the act of the conductor, in itself, in putting plaintiff off the train.—*Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463.

**App. 1903.** A charge on exemplary damages when requested, is proper in an action against the carrier for assault and battery on a passenger in a street car who is maliciously assaulted by the conductor.—*Ickenroth v. St. Louis Transit Co.*, 77 S.W. 162, 102 Mo. App. 597.

**App. 1904.** In an action for wrongful expulsion from a street car, a charge authorizing the jury to consider, in fixing the actual and punitive damages, the manner and demeanor of the conductor in ejecting plaintiff "and his sister" from the car, was erroneous.—*Summerfield v. St. Louis Transit Co.*, 84 S.W. 172, 193 Mo. App. 718.

**App. 1909.** An instruction, in an action against a railway company for ejecting a passenger, was erroneous for not restricting recovery to compensatory damages and as authorizing punitive damages.—*Bolles v. Kansas City Southern Ry. Co.*, 115 S.W. 459, 134 Mo. App. 696.

**App. 1912.** In an action for assault and battery, an instruction authorizing a recovery for the reasonable value of medical services rendered plaintiff *held* improper for failure to limit it to the amount claimed therefor in the petition.—*McDonald v. St. Louis & S. F. R. Co.*, 146 S.W. 83, 165 Mo. App. 75.

**App. 1917.** Where a street car conductor wrongfully ejects a passenger and abuses him, an instruction that if he "suffered no injury thereby" he can recover only nominal damages, is erroneous because no ordinary jury would understand that the word "injury" included outrage to one's feelings and self-respect.—*Hartridge v. United Rys. Co. of St. Louis*, 196 S.W. 59.

**App. 1918.** Where newsboy, who went on car to sell papers and was ejected, sued for injuries, asking compensatory and punitive damages, instruction, solely on compensatory damages, authorizing jury to consider "in connection with all facts in evidence" the nature of the injuries, did not permit recovery for punitive damages.—*Griffin v. Kansas City Rys. Co.*, 204 S.W. 826, 199 Mo. App. 682.

**App. 1925.** Given instruction on punitive damages approved.—*Hillebrand v. Wells*, 270 S.W. 402.

#### 385. — Verdict and findings.

**App. 1907.** Where, in an action against a street car company for ejection of a child for failure to pay fare, the jury were required to find that the act was willful and malicious,

and that it was an act of inhumanity, in order to entitle plaintiff to recover, and were also charged that, if the act was wanton and malicious, it would "justify" exemplary damages, the fact that the jury did not find exemplary damages did not establish that it did not find, in support of a verdict for plaintiff, that the conductor's act was malicious and inhuman.—*Harless v. Southwest Missouri Electric Ry. Co.*, 99 S.W. 793, 123 Mo. App. 22.

←386. — **Appeal and error.**

*See explanation, page iii.*

(G) PASSENGERS' EFFECTS.

Passengers on sleeping cars, see post, ←413. Penalty for refusal to check baggage, see ante, ←19, 20.

←387. **Duty of carrier to transport in general.**

**App. 1912.** A contract for the transportation of baggage is an incident to that for the carriage of the passenger.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S.W. 1100, 167 Mo. App. 62.

**App. 1921.** When a carrier finds that an unmarked trunk checked by a passenger to another state contains intoxicating liquors in violation of U. S. Cr. Code, § 240 (18 USCA § 390), it may properly refuse to transport the same.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

←388. **Statutory regulation.**

**App. 1910.** Rev. St. 1899, § 1192, regulates the charges of railroads as common carriers of passengers, and provides that the charges shall be limited to compensation per mile for the transportation of any person with "ordinary baggage." *Held*, that the word "baggage" having been previously well defined to mean such articles of necessity, or personal convenience, as were usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunks of passengers, not destined for such use, but for other purposes, as for sale, and the like, the addition of the word "ordinary" did not limit the word "baggage" to wearing apparel and other articles ordinarily carried by a common traveler, but was used merely to recognize the well-established meaning of the word "baggage" as distinguished from "merchandise."—*Doerner v. St. Louis & S. F. R. Co.*, 130 S.W. 62, 149 Mo. App. 170.

**App. 1914.** Neither Rev. St. 1909, § 3239, nor rules of the Railroad and Warehouse

Commission prevent carriers from transporting jewelry as baggage under special contract.—*Russell v. Quincy, O. & K. C. R. Co.*, 164 S.W. 164, 177 Mo. App. 186.

←389. **Rules of carrier.**

**App. 1906.** Where a carrier had a rule prohibiting passengers from carrying heavy tools into passenger cars, the carrier was entitled to request a passenger, violating the rule to remove the tools, and in case of his refusal so to do, to remove them in a proper manner itself.—*Smith v. Atchison, T. & S. F. Ry. Co.*, 97 S.W. 1007, 122 Mo. App. 85.

←390. **Provisions in tickets respecting baggage.**

**App. 1910.** Where a citizen of California, starting with his baggage on the return trip from St. Louis to San Francisco, tendered, and the carrier accepted, his baggage pursuant to the terms of his ticket, whereby it became the duty of the carrier to transport the baggage from St. Louis to San Francisco, and there deliver it to the passenger, the place of performance of the contract was San Francisco.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

**App. 1912.** A passenger was not bound by a special contract contained in his ticket, where such ticket was retained by the carrier's agent in charge of the train and not delivered to the passenger; he being entitled to assume that no limitations on the carrier's common-law liability were intended.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S.W. 1100, 167 Mo. App. 62.

A passenger purchasing transportation at a reduced fare is chargeable with knowledge of such reduction, and that the ticket is a contract for transportation, and not a mere token or evidence of such contract.—*Id.*

**App. 1916.** In passenger's action for loss of baggage, where contract of carriage was made in foreign country, but there was no evidence as to law of such foreign country, law of forum governs.—*Drozinski v. Hamburg-American Line*, 181 S.W. 1164. See Carriers, ←234 in this Digest.

←391. **Articles constituting personal baggage.**

Questions for jury, see post, ←408(6).

**App. 1897.** A bicycle neither boxed, packed, nor guarded in any way is not ordinary baggage, and a carrier is under no obligation, under Rev. St. 1889, §§ 2673-2676, to receive it as baggage in such a condition.

—State ex rel. *Bettis v. Missouri Pac. Ry. Co.*, 71 Mo. App. 385.

**App. 1905.** Articles of jewelry, such as opera glasses, watches, bracelets, pins, and rings carried in a woman's trunk, to be worn for her personal use and ornament, may be found by a jury to be baggage.—*Hubbard v. Mobile & O. R. Co.*, 87 S.W. 52, 112 Mo. App. 459.

**App. 1906.** Samples of stationery which a passenger was engaged in selling did not constitute baggage.—*Rossier v. Wabash R. Co.*, 91 S.W. 1018, 115 Mo. App. 515.

**App. 1910.** "Baggage" means those articles of personal convenience and adornment usually taken by a passenger on a journey or a visit, and suitable to his station in life and social standing.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

**App. 1910.** The term "baggage" includes such articles of jewelry and personal ornament as are appropriate to the wardrobe, rank, and social position of the passenger.—*Doerner v. St. Louis & S. F. R. Co.*, 130 S.W. 62, 149 Mo. App. 170.

### 392. Extra baggage and special contracts.

**App. 1886.** The fact that a passenger pays the charges made for extra baggage does not entitle the passenger to have articles carried as baggage which are not properly baggage, but merely entitles him to have the articles with him carried as baggage without regard to the amount of them.—*Spooner v. Hannibal & St. J. Ry. Co.*, 23 Mo. App. 403.

### 393. Delivery to carrier.

**App. 1912.** Baggage of passengers on excursion train held to have been received by the carrier for transportation, within Rev. St. 1900, § 3138, giving right of action for failure to deliver baggage on demand, although the passengers had access to the baggage.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S.W. 1100, 167 Mo. App. 62.

**App. 1926.** Carrier's liability attaches on delivery and acceptance of baggage within a reasonable time before departure.—*Saffa v. Illinois Cent. R. Co.*, 279 S.W. 223, 218 Mo. App. 502.

Carrier held under no duty to assume liability of carrier to baggage 14 hours before departure of train.—Id.

### 394. Checks and receipts.

Limitation of liability, see post, 405(3).

**Sup. 1867.** Where the plaintiff had intrusted his trunk and a package of carpeting to the care of a baggage master, the defendant's servant, and received a check for the trunk, but was told that no check was necessary for the carpeting, and that it would go safely without, and the carpeting was afterwards lost on the transit, the defendant, as a common carrier, was responsible for the act of its servant, and liable for the loss, and it was immaterial that the baggage master was expressly directed not to receive or check such packages as baggage, the plaintiff having no notice of such direction.—*Minter v. Pacific R. R.*, 41 Mo. 503, 97 Am. Dec. 288.

### 395. Transportation and delivery to passenger.

**App. 1921.** When a railroad discovered that an unmarked trunk checked by a passenger traveling to dry territory contained intoxicating liquor in violation of Act March 1, 1913, c. 90, 37 Stat. 699 (27 USCA § 1 note), it was excused from transporting and delivering the trunk and its contents in the dry territory.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

Where whisky in an unmarked trunk checked by a passenger traveling to another state was lawfully seized by a United States revenue officer, under U. S. Cr. Code, § 240 (18 USCA § 390), the carrier's liability for failure to transport and deliver was thereby destroyed, though destruction of the whisky by the officer was without authority of law.—Id.

Where a United States revenue officer seized a trunk which contained whisky in violation of U. S. Cr. Code, § 240 (18 USCA § 390), and confiscated the trunk and its other contents as well as the whisky, when the whisky could have been readily removed from the trunk and its other contents, the officer indicating at once an intention to confiscate not only the whisky but the trunk and other contents, the mere fact of the seizure and confiscation did not relieve the carrier of liability for failure to properly care for the trunk and the contents other than the whisky.—Id.

**App. 1924.** A carrier's misdelivery or delivery to a wrong person of a trunk and contents, intrusted to it, is a conversion, though trunk is subsequently recovered and delivered, minus the contents, to proper person.—*Boone v. Missouri Pac. R. Co.*, 263 S.W. 495, certiorari granted (1925) Missouri Pac. R. Co. v. Boone, 45 S. Ct. 196, 266 U. S. 600, 69 L. Ed. 461, and judgment affirmed

(1926) 46 S. Ct. 341, 270 U. S. 466, 70 L. Ed. 688.

**App. 1926.** Carrier is liable for passenger's baggage until reasonable time is afforded to remove it.—*Saffa v. Illinois Cent. R. Co.*, 279 S.W. 223, 218 Mo. App. 502.

Reasonable time for removal of baggage depends on facts and circumstances of each case.—*Id.*

←396. **Delay in transportation or delivery.**

See explanation, page iii.

←397. **Loss or injury.**

Liability of connecting carriers, see post, ←406.

←397½. — **Baggage in general.**

Transfer company as carrier, see ante, ←108, 115.

**App. 1877.** Liability of a railroad company for baggage destroyed at station after arrival at destination. See *Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 583, memorandum.

**App. 1886.** Where a valise, checked by a passenger as baggage, contained articles which were not baggage and articles which were baggage, the passenger is entitled to recover for the loss of the articles which were properly baggage.—*Spooner v. Hannibal & St. J. Ry. Co.*, 23 Mo. App. 403.

**App. 1905.** A carrier is, in respect to baggage, under the responsibility of a carrier of freight, and is thus, in the absence of a special restriction of liability, an insurer against every loss except one due to the act of God or of a public enemy.—*Hubbard v. Mobile & O. R. Co.*, 87 S.W. 52, 112 Mo. App. 459.

In the absence of a special agreement the carrier's common-law liability for baggage, of the nature of which it is ignorant, embraces only such articles as are baggage in a technical sense.—*Id.*

**App. 1910.** Where a railroad company agreed to and did furnish a baggage car for the use of the passengers on an excursion, it was the implied duty of the railroad as common carrier to take charge of the baggage of the passengers loaded on such car; it being relieved from such responsibility only for baggage which is portable and which the passenger takes with him.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 236, 144 Mo. App. 71.

When a passenger took passage in an excursion train, he had the right to assume that his baggage would be under the care of the railroad's baggagemaster, unless he knew that the passengers were to furnish a baggagemaster of their own.—*Id.*

**App. 1915.** Defendant railroad held liable as insurer for loss of tent and blankets carried by passenger and used in his business of operating a shooting gallery at fairs and circuses.—*Strome v. Lusk*, 180 S.W. 27.

**App. 1921.** Where a passenger going to another state checked a trunk containing whisky in violation of U. S. Cr. Code, § 240 (18 USCA § 390), and the trunk and contents were seized, the carrier, as to the trunk and contents other than whisky, was liable at least as a gratuitous bailee, and could be held responsible for gross negligence in handling and dealing with the trunk, and its contents.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

←398. — **Merchandise other than personal baggage.**

**App. 1877.** Liability of a railroad company for loss of merchandise carried as baggage. See *Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 583, memorandum.

**App. 1900.** In an action against a carrier to recover for loss of baggage, it appeared that plaintiff, on purchasing his ticket, tendered to defendant's agent as baggage a pine box containing books. The agent was informed of the contents of the box, but he received and weighed it and charged plaintiff for the excess in the weight which plaintiff paid. Plaintiff did not know that the agent had no authority to check the books as baggage. *Held*, that the carrier was liable.—*Sherlock v. Chicago, R. I. & P. Ry. Co.*, 85 Mo. App. 46.

**App. 1914.** At common law a carrier was not required to carry sample merchandise, not personal baggage, nor liable as an insurer for loss or injury thereto.—*Baack-Dyer & Brecht Millinery Co. v. Chicago & A. R. Co.*, 164 S.W. 175, 177 Mo. App. 282.

**App. 1914.** Upon loss and breakage of instruments, etc., of a veterinary surgeon, in a handgrip checked to destination, *held* plaintiff could recover, whether or not the articles were baggage within Rev. St. § 3236.—*Ross v. St. Louis, I. M. & S. Ry. Co.*, 170 S.W. 920, 185 Mo. App. 154.

←399. — **Money and valuables.**

**Sup. 1855.** The implied obligation of a common carrier to carry the baggage of a

passenger does not extend beyond ordinary baggage, or such as a traveler usually carries with him for his personal convenience; nor does it include more money than a reasonable amount to pay traveling expenses.—*Whitmore v. The Caroline*, 20 Mo. 513.

The owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown.—*Id.*

**App. 1915.** Defendant railroad, carrying for passenger jewelry used by him in connection with his business of operating a shooting gallery at fairs and circuses, *held* not liable for loss of such jewelry as an insurer.—*Strome v. Lusk*, 180 S.W. 27.

Under Rev. St. 1909, § 3239, defendant railroad *held* not liable for loss of jewelry carried as baggage in passenger's trunk without special contract or knowledge of defendant or its agents of the fact.—*Id.*

400. — Notice to carrier of nature or value of goods.

**App. 1877.** Where the carrier has knowledge of the character of baggage, and permits it to be transported as baggage, it cannot avoid liability on the ground that the passenger fraudulently represented that it was personal baggage.—*Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 583.

**App. 1884.** A railroad company, taking a trunk containing valuable merchandise as a passenger's baggage, is subject to the liabilities of a common carrier therefor, if it knew of its contents.—*Rider v. Wabash, St. L. & P. Ry. Co.*, 14 Mo. App. 529.

The fact that railroad employes generally know that a trunk like plaintiff's, lost on defendant's train, is a sample trunk, is not alone sufficient to charge the conductor of a freight train, receiving the trunk as baggage, with knowledge that it was a sample trunk containing valuable merchandise.—*Id.*

A passenger on a freight train, on learning that his sample trunk, containing valuable merchandise, of which the conductor had no knowledge could not be placed in the caboose, obtained permission of the conductor to place it in a box car, from which it was stolen. *Held*, that the railroad company was not liable.—*Id.*

**App. 1906.** If a carrier receives merchandise as personal baggage knowing its true

character, it will be liable for it as for baggage.—*Rossier v. Wabash R. Co.*, 91 S.W. 1018, 115 Mo. App. 515.

The fact that merchandise being carried by a passenger was carried in receptacles, called sample cases, did not conclusively show that the carrier knew that they contained merchandise.—*Id.*

**App. 1910.** A passenger, to bind the carrier and create a liability for baggage, was not bound, in the absence of reasonable inquiry, to disclose the contents of her suit case or the value thereof, at the time she checked the same.—*Doerner v. St. Louis & S. F. R. Co.*, 130 S.W. 62, 140 Mo. App. 170.

401. — Property under control of passenger.

Notice of nonliability, see post, 405(2).

**App. 1906.** Plaintiff and his companion entered defendant's smoking car with some heavy iron tools, and laid them in the aisle of the car, close to their seat, in violation of a rule prohibiting passengers from taking such articles into a passenger car. The brakeman remonstrated with plaintiff, and with threatening, profane, and insulting language demanded that they "take care" of the tools, and on plaintiff's refusal to interfere, took the tools to the door of the car, and threw them from the running train. *Held*, that the brakeman's conduct was not justified by plaintiff's breach of the rule, but that the brakeman was a trespasser ab initio for whose act plaintiff could recover.—*Smith v. Atchison, T. & S. F. Ry. Co.*, 97 S.W. 1007, 122 Mo. App. 85.

402. — Proximate cause.

See explanation, page iii.

403. — Contributory negligence of passenger.

**App. 1930.** Where a passenger of a railroad on arriving at his destination went forward to the platform of the station to receive his baggage, but did not find it there, and could not find any agent of the railroad in charge of the station, and did not again call for his baggage until the second day thereafter, he was not guilty of contributory negligence precluding recovery for the baggage which had been stolen in the meantime.—*Felton v. Chicago Great Western Ry. Co.*, 86 Mo. App. 332.

404. Carrier as warehouseman.

Evidence, see post, 408.

**Sup. 1901.** Where a passenger neglects to take baggage from the possession of a railroad company within a reasonable time, the company is subject to a contractual liability to care therefor as warehouseman.—*Blackmore v. Missouri Pac. Ry. Co.*, 62 S.W. 993, 102 Mo. 455.

**App. 1893.** Plaintiff at 4 p. m. took a trunk to the railway station. He intended to take a train the next morning, and was told by the agent that it would be time enough to check the trunk in the morning. Plaintiff agreed to leave the trunk there. During the night it burned up. *Held*, that the liability of the railway company was that of a mere warehouseman.—*Goodbar v. Wabash Ry. Co.*, 53 Mo. App. 431.

**App. 1894.** Where a passenger fails to claim his baggage within a reasonable time, the contract of storage cannot be supported by the consideration paid for the transportation, and where there is no evidence that such passenger intended to pay or that the carrier had a right by custom or otherwise to exact charges for storage, the liability of the carrier becomes that of a gratuitous bailee.—*Cohen v. St. Louis, I. M. & S. Ry. Co.*, 59 Mo. App. 66.

**App. 1900.** A railroad is liable only as a warehouseman for baggage left in its charge by the owner after ample opportunity to remove it.—*Felton v. Chicago Great Western Ry. Co.*, 86 Mo. App. 332.

A passenger, on alighting at the station, was unable to get any information when his trunk would arrive. It arrived the next afternoon, and was burglarized that night in the station, and he called for it on the next day. *Held* that the carrier's relation to plaintiff was still that of carrier when the trunk was burglarized, and its liability was not reduced to that of a warehouseman.—*Id.*

**App. 1905.** The status of warehouseman sets in and that of carrier ceases when the passenger has had a reasonable time in which to take his baggage away after it has reached its destination and been unloaded from the train.—*Hubbard v. Mobile & O. R. Co.*, 87 S. W. 52, 112 Mo. App. 459.

A carrier which contracts to carry a passenger and baggage through to destination is liable for the baggage, either as carrier or warehouseman, until delivery to the passenger at destination; but its liability as warehouseman, after its capacity as such commences, only extends to a loss of the baggage by negligence.—*Id.*

**App. 1906.** A carrier whose duty in relation to baggage is that of a warehouseman, is bound in storing the baggage, to use such care and prudence as would be used by a man of ordinary prudence and caution in caring for his own property in similar circumstances.—*Rossier v. Wabash R. Co.*, 91 S.W. 1018, 115 Mo. App. 515.

Where a passenger fails to call for his baggage within a reasonable time after arrival at destination, the duty of the carrier as to the baggage becomes that of a warehouseman.—*Id.*

**App. 1911.** After a passenger's trunks are unloaded from the train, and especially after the carrier is compelled, by the passenger's failure to claim and remove them, to store them in its depot, its duties with respect thereto are only those of a warehouseman.—*Levi v. Missouri, K. & T. Ry. Co.*, 138 S.W. 690, 157 Mo. App. 536.

No inference of negligence of a carrier holding as a warehouseman a passenger's trunks in its freight depot destroyed by fire can be drawn from the fact that it had converted a box car into a freight depot.—*Id.*

A carrier holding as a warehouseman a passenger's trunk in its depot destroyed by fire was under no duty to keep a night watchman; the station being in a respectable residence part of the town, and there being no lawless element to contend against.—*Id.*

**App. 1923.** Where trunk on arrival at station was left there under an agreement with terminal company that storage would be paid therefor, the liability of the terminal company was that of a warehouseman, and bailee for hire, and not that of a common carrier.—*Bowles v. Payne*, 251 S.W. 101.

**App. 1926.** Carrier is liable for passenger's baggage until reasonable time is afforded to remove it, and thereafter liability is that of warehouseman.—*Saffa v. Illinois Cent. R. Co.*, 279 S.W. 223, 218 Mo. App. 502.

Passenger *held* to have had reasonable time to remove baggage reducing carrier's liability thereafter to a warehouseman.—*Id.*

Where baggage is received at an unreasonable time before passage, carrier's liability is that of a warehouseman only.—*Id.*

Plaintiff *held* to have assented to leave baggage with carrier as warehouseman.—*Id.*

Ⓔ405. **Limitation of liability.**  
Connecting carriers, see post, Ⓔ406.



405 (1). Power to limit liability.

**App. 1923.** A railroad which had not published any schedule of charges for the carriage of overweight baggage under the provisions of Rev. St. 1919, § 10449, or by rule or otherwise sought to bring itself within the provisions thereof, could not claim a limit of liability for loss of intrastate baggage, though it had a rule limiting or attempting to limit its liability under the interstate law.—*Bowles v. Payne*, 251 S.W. 101.

405 (2). Mode and form of limitation in general.

**Sup. 1873.** A railroad passenger, without special notice of the company's regulation that "live animals are allowed as baggage men's perquisites," committed a dog to the baggage master, and paid him for its transportation. *Held*, that the company was liable for the loss of the dog by the baggage man's delivering it up to the wrong person.—*Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476.

**App. 1912.** A notice of nonliability *held* not to excuse a common carrier from liability for valuable articles of baggage of necessity and convenience, and usually carried by the passenger, taken by such passenger to his stateroom.—*Joy v. Lee*, 149 S.W. 328, 106 Mo. App. 526.

**App. 1916.** Where plaintiff had already paid for her passage upon assurance that the company would be liable for her baggage, subsequent delivery to her of a contract, limiting the carrier's liability, will not defeat recovery for loss of baggage, where plaintiff did not understand the language in which it was written and did not sign it.—*Drozinski v. Hamburg-American Line*, 181 S.W. 1164, 193 Mo. App. 60.

405 (3). Provisions in ticket, check, or receipt.

**App. 1899.** A stipulation in a passenger ticket limiting the liability of a carrier for loss of baggage to a specified sum is a contract limiting the liability of a carrier, and the passenger will be presumed to have assented thereto.—*Alken v. Wabash R. Co.*, 80 Mo. App. 8.

A railroad had two rates, the greater for an unconditional and unlimited ticket, and the lesser for a conditional ticket. A passenger purchased the cheaper ticket, which contained a stipulation limiting the liability of the carrier for loss of baggage to a specified amount. *Held*, that the stipulation in

the ticket, being regarded as a contract between the carrier and the passenger, was supported by a valuable consideration.—*Id.*

**App. 1910.** Usually the acceptance without protest of a ticket or receipt for property, issued by a carrier and containing restrictions of the carrier's liability, will be treated as an assent by the patron to the terms of the receipt or ticket; and the carrier need not offer an option between the two classes of contracts, but it is sufficient if the patron could have had the unrestricted contract had he demanded it.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

Cal. Civ. Code, § 2174, provides that the obligation of a carrier cannot be limited by general notice on his part, but may be limited by special contract; section 2175 provides that a carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants; section 2176 provides that a passenger, by accepting a ticket or written contract for carriage with the knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated, and also the limitation stated therein upon the amount of the carrier's liability for trunks lost or injured, when the value of such property is not named, but his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same. *Held*, that an independent consideration for a limitation of the common-law liability such as a reduced rate of fare or freight is essential; and, where a passenger bought a ticket in California to St. Louis and return, which limited the carrier's liability for loss of baggage, and the carrier did not have for sale an unrestricted liability ticket, so that the passenger had no choice of contracts, the ticket he bought was not sold at a reduced rate, so as to be consideration for limitation of liability, and upon loss of the baggage on the return trip he could recover therefor free from limitations.—*Id.*

**App. 1914.** The plaintiff, in an action for loss of baggage checked on a railroad, by declaring upon the contract for the carriage of herself and baggage, affirmed its validity, and was bound by a limitation of liability in her ticket, which she claimed to have signed without knowing its contents and because of misrepresentation.—*Meade v. Missouri, K. & T. Ry. Co.*, 166 S.W. 1116, 183 Mo. App. 353.

#### ←405 (4). Operation and effect of limitation.

**App. 1914.** Under Rev. St. 1909, § 3236, and section 3239, *held*, that the limitation of recovery did not apply to a case of liability for negligence, but went only to the carrier's liability as an insurer.—*Baack, Dyer & Brecht Millinery Co. v. Chicago & A. R. Co.*, 164 S.W. 175, 177 Mo. App. 282.

**App. 1914.** Under the federal statutes, the provision, in a ticket for interstate transportation, limiting the carrier's baggage liability to "\$100 for a whole ticket," being in accordance with the carrier's tariff filed with the Interstate Commerce Commission, governs in case of loss, even through the carrier's negligence; the passenger not having, at time of checking her baggage, declared a greater value and offered to pay for additional service.—*Wright v. Southern Pac. Co.*, 167 S.W. 1137, 181 Mo. App. 137.

**App. 1921.** Where plaintiff passenger checked a trunk under an agreed valuation of \$100, and the trunk was seized by a government official by reason of its containing whisky in violation of U. S. Cr. Code, § 240 (18 USCA § 390), and the carrier was negligent in permitting the government official to dispose of the trunk and contents other than the whisky, plaintiff could recover no more than \$100, notwithstanding that his wrong in placing the whisky in the trunk may have changed the degree of care or other incidents of defendant's liability.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

**App. 1924.** A carrier converting an article intrusted to it by delivery to wrong person thereby in effect abandons its contract with the shipper and cannot thereafter rely upon the provisions of such contract to limit its liability.—*Boone v. Missouri Pac. R. Co.*, 263 S.W. 405, certiorari granted (1925) *Missouri Pac. R. Co. v. Boone*, 45 S. Ct. 196, 260 U. S. 600, 69 L. Ed. 461, and judgment affirmed (1926) 46 S. Ct. 341, 270 U. S. 466, 70 L. Ed. 688.

#### ←406. Connecting carriers.

Burden of proof, see post, ←408.

**App. 1881.** Where one railroad company sells to a traveler a through ticket and a through check for his baggage over its own and connecting roads, a contract exists with each carrier who under it undertakes the transportation of the passenger and his baggage.—*Lin v. Terre Haute & I. R. R.*, 10 Mo. App. 125.

Where one railroad company sells to a passenger a through ticket and a through check for his baggage over its own and one or more other connecting roads, and in pursuance of the contract thus made the passenger is transported to the destination called for by the ticket and the check and the baggage are delivered to him by the last carrier, the lock broken and a portion of the contents stolen, the passenger, showing these facts under suitable allegations, is entitled to recover damages from the last carrier, unless such carrier shows that he delivered the baggage in the same condition in which he received it.—*Id.*

**App. 1899.** A connecting carrier, acting as the agent of the initial carrier in carrying a passenger, is entitled to the benefits of a contract made with the initial carrier limiting the carrier's liability for loss to baggage to a fixed sum.—*Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

**App. 1905.** A carrier which agrees to transport a passenger and her baggage to destination is, in the absence of a special agreement limiting its responsibility, liable throughout the journey for the loss of the baggage by itself or by any other carrier which assists in performing the contract.—*Hubbard v. Mobile & O. R. Co.*, 87 S.W. 52, 112 Mo. App. 459.

**App. 1905.** Plaintiff bought a passenger ticket of defendant for transportation over its road to a certain point, and thence over another road, and checked his baggage to a point he knew was on the connecting road; he knowing also that the ticket recited that defendant assumed no responsibility beyond its own line. *Held*, that defendant was not liable for loss of plaintiff's baggage, after it was delivered to the connecting carrier; the baggage check reading: "The A. Ry. Co. [defendant] from C. to H., via A. Ry. Co. and O. R. Co. [the connecting carrier]. Junction point, O. City"—not constituting a contract, or effecting the question, and Rev. St. 1899, § 5222, providing that when a carrier receives property for transportation, or issues bills of lading it shall be liable for loss of the property, though caused by negligence of a connecting carrier, being limited to contracts of affreightment.—*Griffith v. Atchison, T. & S. F. R. Co.*, 90 S.W. 408, 114 Mo. App. 591.

**App. 1912.** The first of several connecting carriers is not liable beyond its own line, except where there is a contract for through transportation; but such contract may be

implied from the circumstances, or from the usage of the carrier.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S.W. 1100, 167 Mo. App. 62.

407. **Charges and lien.**

**App. 1911.** A carrier has no lien on a passenger's baggage for the fare of her infant child, accompanying her, which she refuses to pay.—*Cantwell v. Terminal R. Ass'n of St. Louis*, 140 S.W. 906, 160 Mo. App. 393.

A final carrier, detaining baggage on a mere blind charge of a previous carrier, does so at its peril, if the charge be not shown to be one connected with the transportation of the passenger or baggage, so as to entitle the previous carrier to a lien.—*Id.*

A terminal railroad association, not a carrier of a passenger or of her baggage, which receives her baggage from the final carrier after the carriage is complete, in holding the baggage and asserting a lien thereon for a charge of a previous carrier, does so as a mere agent, and as such has no greater rights than its principal.—*Id.*

408. **Actions.**

408 (1). **Rights of action.**

*See explanation, page iii.*

408 (2). **Parties.**

**App. 1912.** A husband paying for transportation of himself and wife *held* entitled to recover for loss of baggage, consisting principally of the wife's wearing apparel.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S.W. 1100, 167 Mo. App. 62.

408 (3). **Pleading.**

**App. 1905.** A petition against a carrier for the loss of baggage is not converted into a petition for negligence, so as to require proof thereof, by mere allegation that the loss was occasioned by the negligence of defendant's employees.—*Hubbard v. Mobile & O. R. Co.*, 87 S.W. 52, 112 Mo. App. 459.

**App. 1914.** The cause of action alleged by the petition, loss of baggage in interstate transportation, being governed by federal laws, defendant is not deprived of a defense thereunder, under its general traverse, because of pleading a special defense founded on a state law.—*Wright v. Southern Pac. Co.*, 167 S.W. 1137, 181 Mo. App. 137.

408 (4). **Evidence.**

In action against transfer company, see ante, 134.

**Sup. 1869.** In an action against a common carrier to recover the value of a trunk and contents, shipped but never delivered, the testimony of one who saw the trunk packed, six or eight weeks before the shipment, is admissible evidence to show the contents and their value at the time of shipment, although the lapse of time between the two periods would weaken the force of such testimony.—*Sugg v. Memphis & St. L. Packet Co.*, 40 Mo. 442.

**App. 1881.** In an action for damage to baggage, evidence that, when the last carrier delivered the baggage to the passenger or his agent, the package was broken and some of the contents missing, is *prima facie* evidence that the loss happened through the negligence or fraud of the last carrier, which evidence casts upon such carrier the burden of proving that the loss happened while the baggage was in the hands of some other carrier.—*Llin v. Terre Haute & I. R. R.*, 10 Mo. App. 125.

**App. 1886.** The word "baggage" has a well-defined legal meaning, and the court will presume that the word "baggage" as used in Rev. St. 1879, § 804, requiring the checking of baggage taken for transportation, was used in accordance with such meaning.—*Spooner v. Hannibal & St. J. Ry. Co.*, 23 Mo. App. 403.

**App. 1894.** In an action against a carrier as a gratuitous bailee of plaintiff's trunk, evidence reviewed, and *held*, that there was nothing to show that defendant was guilty of want of ordinary care in the storage of the goods.—*Cohen v. St. Louis, I. M. & S. Ry. Co.*, 59 Mo. App. 66.

**App. 1905.** Evidence that a passenger's trunk was received by the carrier in good condition, and that articles packed in it by the passenger were gone when it was restored to her at her destination, makes a *prima facie* case in her favor.—*Hubbard v. Mobile & O. R. Co.*, 87 S.W. 52, 112 Mo. App. 459.

Where a carrier undertook to deliver a passenger and her baggage to destination, the mere fact that the passenger received the baggage from a terminal association does not, in the absence of evidence showing how the terminal association obtained possession of the baggage, show that the carrier had performed its duty of delivering the baggage, and exempt it from responsibility, both as carrier and as warehouseman, for a loss of certain articles of baggage.—*Id.*

In an action against a carrier for the loss of baggage, the burden is on the carrier

to show that it had discharged its duty as carrier by unloading the baggage at its destination in good order, and keep it a reasonable time subject to the passenger's orders, and that any damage to, or loss of, the baggage occurred subsequently, while it was acting merely as warehouseman.—Id.

**App. 1910.** The misrouting of baggage by a carrier at a junction point is strong proof of gross negligence.—*Robert v. Chicago & A. R. Co.*, 127 S.W. 925, 148 Mo. App. 96.

**App. 1910.** In an action by a passenger for the loss of baggage on an excursion, evidence *held* not to show conclusively that one employed as cook and to take charge of the baggage, relying for his compensation on tips from the passengers, was employed by the excursionists rather than the railroad company.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 236, 144 Mo. App. 71.

An advertisement signed by a general passenger agent of a railroad company and a representative of a party of excursionists, stating that "a special baggage car is attached to the train, with our own baggagemaster in charge," does not show conclusively that the person in charge of the baggage was the agent of the passengers, though it might be taken into consideration by the jury as evidence of that fact.—Id.

**App. 1911.** That oil-soaked waste was kept in the car, used as a freight depot, may be shown as having a bearing on the cause of the fire in the car, by which trunks held by the carrier as warehouseman were burned.—*Levi v. Missouri, K. & T. Ry. Co.*, 138 S. W. 699, 157 Mo. App. 536.

**App. 1914.** In an action for damages for injury and loss to trunks carried as sample baggage, evidence *held* to sustain a finding of the carrier's negligence.—*Baack, Dyer & Brecht Millinery Co. v. Chicago & A. R. Co.*, 164 S.W. 175, 177 Mo. App. 282.

**App. 1914.** In an action for the loss and breakage of articles in a passenger's grip, plaintiff's proof that when he delivered the grip to defendant it was in good condition, and when he received it 60 days later some of the contents were gone and some damaged, *held* sufficient to make out a prima facie case of negligence against the carrier as bailee.—*Ross v. St. Louis, I. M. & S. Ry. Co.*, 170 S.W. 920, 185 Mo. App. 154.

**App. 1921.** In an action to recover the value of a trunk and contents which defend-

ant carrier failed to transport and deliver, a government official having confiscated the trunk and contents by reason of its containing several bottles of whisky in violation of U. S. Cr. Code, § 240 (18 USCA § 390), the burden of proof was on defendant carrier to show that it exercised proper care with reference to the property other than the whisky, which was imposed on it as at least a gratuitous bailee.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

#### 408 (5). Damages.

**App. 1886.** The measure of damages in an action for the loss of baggage is the value of the property lost, with interest, and, if the property has a market value, the market value controls; otherwise, the value of it for use to plaintiff.—*Spooner v. Hannibal & St. J. Ry. Co.*, 23 Mo. App. 403.

Expenses incurred by a passenger waiting for his baggage are too remote, in an action by him to recover for the loss of his baggage.—Id.

**App. 1914.** A carrier accepting a veterinary's grip when checked with the instruments therein *held* not liable for loss of fees occasioned by delay in delivering the grip.—*Ross v. St. Louis, I. M. & S. Ry. Co.*, 170 S.W. 920, 185 Mo. App. 154.

Where a carrier negligently handled a passenger's grip which had been checked and which contained articles worth \$26.50 and failed to trace it for 30 days, the passenger's reasonable expense in searching for it was recoverable.—Id.

**App. 1924.** A carrier delivering the baggage of an intrastate passenger to the wrong person *held* liable to the rightful owner under Rev. St. 1919, § 10449, for its full value.—*Boone v. Missouri Pac. R. Co.*, 263 S.W. 495, certiorari granted (1925) *Missouri Pac. R. Co. v. Boone*, 45 S. Ct. 196, 266 U. S. 600, 69 L. Ed. 461, and judgment affirmed (1926) 46 S. Ct. 341, 270 U. S. 466, 70 L. Ed. 688.

#### 408 (6). Questions for jury.

**App. 1886.** Articles carried by a passenger for sale are not baggage as a matter of law.—*Spooner v. Hannibal & St. J. Ry. Co.*, 23 Mo. App. 403.

**App. 1910.** In an action by a passenger for loss of baggage, whether the passenger knew that the passengers were to furnish a baggagemaster of their own was a question for the jury.—*Burnes v. Chicago, R. I. & P. Ry. Co.*, 128 S.W. 236, 144 Mo. App. 71.

**App. 1910.** Where plaintiff, a widow, had traveled extensively at home and abroad, lived on her income, and was in what would be considered good circumstances, whether a diamond breastpin worth \$300 was properly carried by her as ordinary baggage, in accordance with the reasonable requirements of a person in her station of life, was for the jury.—*Doerner v. St. Louis & S. F. R. Co.*, 130 S.W. 62, 140 Mo. App. 170.

**App. 1921.** In an action to recover the value of a trunk and contents which defendant carrier failed to transport and deliver, a government official having seized the trunk by reason of its containing several bottles of whisky in violation of U. S. Cr. Code, § 240 (18 USC'A § 300), whether carrier exercised proper care as to the trunk and the contents other than the whisky *held* a question for the trial court sitting without a jury; the government official having confiscated the trunk and other contents as well as the whisky.—*Shannon v. Hines*, 226 S.W. 283, 205 Mo. App. 629.

**App. 1923.** In an action against terminal company for loss of trunk while acting as warehouseman question of liability of defendant *held*, under the evidence, one of fact for the trial court sitting as a jury.—*Bowles v. Payne*, 251 S.W. 101.

**App. 1926.** Question as to reasonable time afforded passenger to remove baggage for jury if facts are in dispute, otherwise for court.—*Saffa v. Illinois Cent. R. Co.*, 279 S.W. 223, 218 Mo. App. 502.

408 (7). Instructions.

**App. 1894.** In an action against a carrier for the loss of plaintiff's trunk, defendant being a mere gratuitous bailee and required to use ordinary care, the court should instruct the jury as to the meaning of ordinary care, and not leave it to their determination, without any guide whether the place of storage was reasonably safe.—*Cohen v. St. Louis, I. M. & S. Ry. Co.*, 59 Mo. App. 66.

(H) PALACE CARS AND SLEEPING CARS.

408½. Constitutional and statutory provisions.

*See explanation, page iii.*

409. Duties and liabilities incident to ownership and control in general.

**App. 1886.** Sleeping car companies are not held to the responsibilities of common

carriers, or of innkeepers, but to a peculiar responsibility, which is implied in their contract with passengers; and the measure of their responsibility and the sufficiency of their discharge of it in a particular case is for the jury to determine.—*Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29.

**App. 1903.** Where the porter of a sleeping car acts in the capacity of both conductor and porter, collects fares, assigns passengers to their berths, and is the sole representative of the company on that car, he must be regarded as a vice principal, and his acts are binding on the company.—*Morrow v. Pullman Palace Car Co.*, 73 S.W. 281, 98 Mo. App. 351.

409½. Duty to receive passengers.

*See explanation, page iii.*

410. Contracts for accommodations.

*See explanation, page iii.*

411. Duties and liabilities as to person of passenger.

**App. 1924.** Injury to passenger's back by sneezing, or attempting to suppress sneezing, because she had to travel in drafty chair car without heat operated by railroad company, cannot be said to be proximate and natural result of breach by defendant Pullman company of contract to furnish berth, "proximate cause" being the active efficient cause which sets in motion a train of events that in their natural sequence might and ought to be expected to produce an injury as undisturbed by any independent intervening cause.—*O'Neil v. Pullman Co.*, 260 S.W. 798, 214 Mo. App. 283.

412. Ejection of passengers.

**App. 1908.** A passenger having a sleeping car ticket designating a certain berth was assigned his berth by the servants of the sleeping car company. After having his baggage placed therein he went into the smoking compartment, and while there his ticket was called for by the sleeping car conductor. Later on, being awakened by the conductor, who requested his ticket, he answered that it had been taken up, which the conductor denied and ordered him out of the berth. Angry words were exchanged, threats made, and finally the bed clothing was pulled off plaintiff, and he was made to get out. There was evidence tending to show that the passenger was on an earlier train than that which his ticket called for, which train was so long delayed that the train for which he had procured a berth was due. *Held* that,

where the servants of the carrier made a mistake in assigning the passenger his berth on the wrong train, the carrier was liable for the serious inconvenience and humiliation inflicted upon the passenger in ousting him from his berth, though the ousting was done upon demand for his berth made by another passenger who held the ticket for that berth.—*Taylor v. Wabash R. Co.*, 109 S.W. 1059, 130 Mo. App. 582.

#### ←413. Duties and liabilities as to passenger's effects.

Questions for jury, see post, ←417.

##### ←413 (1). In general.

**App. 1887.** Where the porter of a sleeping car company steals the money of a passenger necessary for the passenger's traveling expenses, the liability of the company is not affected by proof of contributory negligence on the part of the passenger, not the proximate cause of the loss.—*Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199.

**App. 1888.** A passenger in a sleeping car, who loses money either through the negligence or theft of the employés on the car, cannot recover from the company a larger sum than was reasonably necessary for his traveling expenses; regard being had to the purposes of his journey and his circumstances in life.—*Wilson v. Baltimore & O. R. Co.*, 32 Mo. App. 682.

**App. 1890.** The liability of sleeping car companies covers such articles of baggage as are ordinarily or usually carried by travelers in like situation in valises which they carry with them into the car, and articles considered as baggage when delivered to a carrier are baggage when delivered to a sleeping car company.—*Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.

**App. 1903.** Though a sleeping car company was under no obligation to permit a passenger to occupy a bed in the smoking compartment of the car, yet where the servant in charge of the car permitted the passenger to do so the company assumed to the latter the same duties as if he had occupied a regular berth, in the absence of any collusion between the servant and the passenger to defraud the company of its fare.—*Morrow v. Pullman Palace Car Co.*, 73 S.W. 281, 98 Mo. App. 351.

The passenger, because of occupying the smoking compartment under such circumstances, did not assume any risk as to the

safety of his personal belongings different from that of the passengers occupying regular berths.—*Id.*

The articles of wearing apparel, etc., being placed in such compartment by the passenger on retiring, were during the night, while he slept, in the mixed custody of the passenger and the company.—*Id.*

A sleeping car company is not an insurer of the personal belongings of its passengers, but its liability is that of a bailee for hire.—*Id.*

**App. 1913.** A sleeping car company's duty respecting passengers' effects held merely to use due care under particular circumstances.—*Dings v. Pullman Co.*, 154 S.W. 446, 171 Mo. App. 643.

##### ←413 (2). Duty to guard property.

**App. 1887.** A sleeping car company is not an insurer of the baggage of a passenger, but its liability is that of a bailee for hire, and, in case of a loss of the passenger's baggage, the company is liable only on the ground of negligence in the performance of a duty which it assumed to perform for the passenger.—*Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199.

Beyond the amount of baggage and money which it is reasonably necessary for a passenger to take with him, a sleeping car company assumes no duty of watchfulness, and is under no liability in case of loss or theft; for it is not even a gratuitous bailee in respect to such excess of money or baggage.—*Id.*

**App. 1894.** A sleeping car company is bound to exercise such reasonable care in guarding the traveler's baggage in his temporary absence from the berth as is customary in such cases. If a certain guard is necessary, the traveler has a right to rely on the custom, and the omission of a customary guard would constitute negligence.—*Efron v. Wagner Palace Car Co.*, 59 Mo. App. 641.

**App. 1903.** It is the duty of a sleeping car company, in order to protect the personal belongings of its passengers, to maintain in its cars a reasonable watch during the night while the passengers are asleep.—*Morrow v. Pullman Palace Car Co.*, 73 S.W. 281, 98 Mo. App. 351.

**App. 1913.** On a train stopping at a meal station, the sleeping car company discharged its duty to protect the effects of

passengers left in a car by locking the rear door of the car, by keeping the windows closed, and by the conductor standing guard at the forward door.—*Dings v. Pullman Co.*, 154 S.W. 446, 171 Mo. App. 643.

A sleeping car company must use reasonable care to maintain a vigilant watch by competent persons for the safety of passengers' effects while left in the car.—*Id.*

**App. 1923.** A sleeping car company, with respect to a passenger's baggage, is neither an innkeeper, common carrier, or insurer, but is liable for negligence in not keeping reasonable watch over such baggage.—*Fisher v. Pullman Co.*, 254 S.W. 114, 212 Mo. App. 280.

413 (3). **Liability for acts or omissions of employes or fellow passengers.**

**App. 1887.** A sleeping car company is liable to a passenger for the loss of baggage or money necessary for the length, duration, purposes of the journey, and the station in life of the passenger, sustained by reason of the theft thereof by the company's porter, but is not liable for the porter's theft for any amount beyond what is thus necessary.—*Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199.

**App. 1890.** The fact that a passenger on a sleeping car delivered baggage to the railroad company does not prevent her from placing in the valise which she took with her on the car articles which she did not need while on the car, but only expected to use in case she stopped at an intermediate point for a visit; and in a case of loss of such articles the sleeping car company is liable, when the loss is due to the negligence of the servants in charge of the car.—*Hampton v. Palace Car Co.*, 42 Mo. App. 134.

413 (4). **Contributory negligence.**

**App. 1887.** A passenger in a sleeping car, who, without notice to the company's servants, leaves in his berth in an exposed condition a large sum of money, which he could easily have carried on his person, is guilty of contributory negligence.—*Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199.

In an action by a passenger to recover for loss of goods, based on the negligence of the employes in charge of defendant's sleeping car, on which plaintiff was a passenger, contributory negligence of the passenger is available as a defense.—*Id.*

**App. 1888.** A passenger on a sleeping car, who leaves his berth to go to the water-

closet, and leaves a pocketbook containing over \$800 under his pillow, is guilty of negligence as a matter of law.—*Wilson v. Baltimore & O. R. Co.*, 32 Mo. App. 682.

**App. 1889.** In an action against a sleeping car company for damages caused by loss of clothing and other property which plaintiff had placed in the berth above that which he occupied, his action in so doing did not constitute contributory negligence as a matter of law.—*Florida v. Pullman Palace Car Co.*, 37 Mo. App. 598.

**App. 1903.** A passenger who occupies the smoking compartment of a sleeping car, under a special arrangement with the servant in charge of the car, and who retires for the night with knowledge that one of the windows of the compartment is open is not guilty of contributory negligence which will preclude his recovery for the loss of his personal belongings, unless the window was left open at his request.—*Morrow v. Pullman Palace Car Co.*, 73 S.W. 281, 98 Mo. App. 351.

Even if the window was left open at his request, he will not be precluded from recovering unless his property was stolen by a stranger, through the window, from the outside.—*Id.*

A sleeping car company is liable for the thefts of its servants to the extent of the necessary baggage or money of the passenger, regard being had to the character, duration, and purposes of the journey, though the passenger was negligent.—*Id.*

414. **Companies and persons liable.**

**App. 1921.** The railroad company, and not the sleeping car company, is responsible for the operation of train to which sleeping car or Pullman under separate ownership is attached, or of which train it is a part.—*Link v. Atlantic Coast Line R. Co.*, 233 S.W. 834.

415. **Actions for breach of contract.**

**App. 1909.** One suing a sleeping car company for breach of its contract to provide plaintiff and her family with sleeping car accommodations from a designated point to her point of destination cannot recover on proof that her reservation for sleeping car accommodations was from an intermediate point to the point of destination.—*Smith v. Pullman Co.*, 119 S.W. 1072, 138 Mo. App. 238.

In an action on a contract binding a sleeping car company to provide a passenger with sleeping car accommodations between

designated points, evidence *held* to show that the contract was made with agents having authority to bind the company.—*Id.*

In such action evidence *held* to establish a contract and its breach, authorizing a recovery for the damages naturally and directly resulting.—*Id.*

In the absence of malice, willfulness, or inhumanity on the part of a sleeping car company breaching its contract to provide a passenger with sleeping car accommodations, there can be no recovery for anxiety, humiliation, or distress of mind unaccompanied by physical injury, nor for physical injury wholly caused by mental disquietude.—*Id.*

In an action against a sleeping car company for breach of contract to provide plaintiff with sleeping car accommodations, evidence *held* not to show that plaintiff's sickness complained of was directly caused by her riding in a chair car, thereby precluding a recovery for mental distress and annoyance.—*Id.*

A sleeping car company breaching its contract to provide a female passenger with sleeping car accommodations is not required to anticipate that a woman in good health will be injured in her health as a natural and probable consequence of its breach.—*Id.*

**App. 1924.** Breach of contract by Pullman company to furnish berth did not entitle passenger to damages for mental pain, though breach made it necessary to ride in chair car.—*O'Neil v. Pullman Co.*, 260 S.W. 798, 214 Mo. App. 283.

Where because of breach of defendant Pullman company's contract to furnish berth plaintiff was compelled to ride in chair car, court properly refused peremptory instruction offered by defendant, plaintiff being entitled in any event to nominal damages.—*Id.*

#### 416. Actions for injuries to or ejection of passenger.

**Sup. 1928.** In passenger's action against Pullman Company for injuries from fall on slippery platform, defendant *held* not entitled to peremptory instruction for contributory negligence.—*Hardeastle v. Pullman Co.*, 10 S.W.(2d) 933, followed in *Hardeastle v. St. Louis-San Francisco Ry. Co.*, 10 S.W.(2d) 935.

**App. 1908.** In an action against a railway company and a sleeping car company for damages for inconvenience and humiliation inflicted upon a passenger by putting him out of

a sleeping car berth, evidence examined, and *held* to show that the servants of the railway company actively joined in the ousting with the servants of the sleeping car company, rendering both defendants joint wrongdoers and jointly liable.—*Taylor v. Wabash R. Co.*, 109 S.W. 1059, 130 Mo. App. 582.

**App. 1918.** In action for injuries to Pullman passenger thrown to floor of car, question of defendant's negligence *held* for jury under evidence as to train's excessive speed and unusual jerk.—*Hale v. Pennsylvania R. Co.*, 200 S.W. 688.

In action for injuries to Pullman passenger thrown to floor of car by lurch, issue of contributory negligence *held* for jury.—*Id.*

**App. 1921.** A general instruction covering all phases of a case wherein plaintiff received an injury in boarding a Pullman car *held* not to permit finding of liability on part of the railroad company, if plaintiff's fall was found due to a foot box's uneven and unsafe position without a finding that it was due to negligence of the railroad company or the Pullman Company's employes.—*Link v. Atlantic Coast Line R. Co.*, 233 S.W. 834.

An amended instruction for defendant in a suit for injuries received by plaintiff when boarding a Pullman car, requiring the jury, in order to find for plaintiff, to find the railroad company guilty of negligence in failing to place a foot stool in a safe position or on an even surface of the platform, and further to find plaintiff was not guilty of contributory negligence in failing to catch the handrail of the car, or give her child, which she was carrying, to an employé, was correct, and covered defendant's theory of the case.—*Id.*

#### 417. Actions for loss of or injury to passenger's effects.

**App. 1887.** In an action against a railroad for the theft of goods belonging to plaintiff while a passenger on a sleeping car, evidence *held* sufficient to authorize a finding of negligence on the part of defendant's servants.—*Bevis v. Baltimore & O. R. Co.*, 26 Mo. App. 19.

The fact that a passenger on a sleeping car has been robbed during the night is of itself evidence of negligence upon the part of the sleeping car company, where the surrounding circumstances are such that the robbery, in the course of ordinary experience, could not have happened, had the sleeping car company's servants been maintaining a proper watch.—*Id.*



**App. 1887.** What is a reasonable amount of baggage or of money for traveling expenses for a passenger to take with him is a question of fact for the jury, to be decided on a consideration of the evidence touching the length, the duration, and the purposes of the journey, and the station in life of the passenger.—*Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199.

**App. 1890.** The statements of a conductor in the charge of a sleeping car, made to a passenger with reference to his placing her baggage in an unoccupied seat opposite her berth, are admissible in evidence in an action against the company for loss of baggage.—*Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.

A statement filed in justice's court in an action against a sleeping car company to recover damages for the loss of baggage alleged that defendant was a corporation doing business throughout the United States, that it was a carrier of passengers and their baggage by railway sleeping cars, and that defendant received into its car plaintiff with her baggage, followed by a specification of the articles comprising the baggage and their value, that defendant did not use proper care, and by its negligence the baggage was wholly lost. *Held*, that the statement stated a cause of action; the allegation as to defendant being a carrier of passengers, if understood to state that it was a common carrier, being surplusage.—*Id.*

**App. 1893.** In an action against a sleeping car company for loss of a passenger's goods, *held*, that there was evidence to support an instruction that, if the jury believe that plaintiff left the watch mentioned in his berth while he went to the toilet room to wash, and allowed said watch to remain in said berth while in that room, without notifying any servant of defendant that the watch was so left in the berth, then plaintiff was guilty of negligence directly contributing to the loss of such watch, and they will find for defendant.—*Chamberlain v. Pullman Palace Car Co.*, 55 Mo. App. 474.

In an action for the negligence of defendant's servants in not sufficiently guarding plaintiff's personal effects, in consequence whereof a watch was stolen out of his waistcoat, lying in the berth occupied by him as a passenger on one of defendant's sleeping cars, there was some substantial evidence that plaintiff had requested the porter to guard his

effects in his absence. *Held*, that the case was properly submitted to the jury.—*Id.*

**App. 1894.** In an action against a sleeping car company for the loss of plaintiff's baggage, evidence reviewed, and *held*, that it was shown by uncontradicted evidence that defendant observed customary care, which must be deemed reasonable care.—*Efron v. Wagner Palace Car Co.*, 59 Mo. App. 641.

**App. 1903.** Whether, in an action against a sleeping car company by a passenger for the recovery for the loss of his personal belongings while a passenger, plaintiff's evidence, which tended to prove that the goods were stolen by defendant's porter, was overcome by defendant's evidence, is a question for the jury.—*Morrow v. Pullman Palace Car Co.*, 73 S.W. 281, 98 Mo. App. 351.

Whether a passenger, in an action against a sleeping car company by him for the recovery for the loss of his personal belongings while a passenger, was guilty of contributory negligence, *held*, under the evidence, a question for the jury.—*Id.*

Whether a sleeping car company, in an action against it by a passenger for the recovery for the loss of his personal belongings, was negligent, *held*, under the evidence, a question for the jury.—*Id.*

**App. 1913.** Mere loss of luggage taken by a passenger into a sleeping car does not make out even a prima facie case of liability against the sleeping car company.—*Dings v. Pullman Co.*, 154 S.W. 446, 171 Mo. App. 643.

**App. 1923.** In an action against a sleeping car company for loss of baggage, where plaintiff by showing defendant's negligence in not keeping reasonable watch had shown more than mere loss or theft, an instruction that it was not enough to show that plaintiff was rightfully traveling in one of defendant's sleeping cars, and while so traveling certain valuables of his were lost or stolen, was not applicable to the facts, and therefore misleading.—*Fisher v. Pullman Co.*, 254 S.W. 114, 212 Mo. App. 280.

In a passenger's action against a sleeping car company for loss of baggage, where evidence of failure to watch on the porter's part was produced, defendant had the burden of explanation of the loss, and hence an instruction which cast on plaintiff such burden was error.—*Id.*

# CEMETERIES.

## *Scope-Note.*

INCLUDES lands used for burial of the dead, whether in churchyards or other places, and regulations relating thereto; organization, franchises, and powers of companies formed to provide and maintain such places; and rights, duties, and liabilities of such companies and of purchasers of lots or other rights or privileges in respect of property.

For related matters under other topics, see Descriptive-Word Index.

## *Analysis.*

- ①1. Power to establish and regulate.
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### ①1. Power to establish and regulate.

**Sup.** 1912. As there can be no dedication of land for private purposes, the owner of land can, in the absence of reservation, establish a private burying ground only in accordance with Rev. St. 1909, § 1303.—*Wooldridge v. Smith*, 147 S.W. 1019, 243 Mo. 190, 40 L. R. A. (N. S.) 752.

**Sup.** 1919. A city by a reasonable ordinance can prohibit further interments in a cemetery within its limits.—*German Evangelical Protestant Congregation of Church of*

*Holy Ghost v. Schreiber*, 209 S.W. 914, 277 Mo. 113, certiorari dismissed (1920) *Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost*, 40 S. Ct. 9, 250 U. S. 677, 63 L. Ed. 1202.

**App.** 1926. There are but two classes of cemeteries, public and private.—*Mount v. Yount*, 281 S.W. 119, 220 Mo. App. 187.

### ②2. Lands constituting cemeteries.

*See explanation, page iii.*

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Consult Pocket Part for later cases. For explanation, see page iii.

3. **Statutory and municipal regulations.**

**Sup. 1913.** Neither the state nor the municipality can preclude itself from enacting laws prohibiting burials in places where they constitute a public nuisance.—*Union Cemetery Ass'n v. Kansas City*, 161 S.W. 291, 252 Mo. 406.

Where the location of a cemetery to a large extent blocked the growth of one part of a city, an ordinance, enacted, not to protect the public health, but to benefit speculators and landowners in the vicinity, which prohibited subsequent burials in the cemetery and would tend to work the destruction of the cemetery, is unreasonable, tyrannical, and invalid.—*Id.*

4. **Establishment by municipalities.**

*See explanation, page iii.*

5. **Companies and associations.**

**Sup. 1908.** A cemetery company, even though knowing persons were in the habit of wandering over the grounds regardless of the roads, is not liable to one owning a lot in the cemetery, who, leaving the roads 500 feet from her lot, which was only 100 to 200 from a road, started across lots to her lot, and stepped in a hole, just large enough for her foot, which was concealed by the grass, and which was not shown to have been made by the company, or to have been known of by it, or likely to be discovered by it, except by accident or extraordinary care.—*Barry v. Calvary Cemetery Ass'n*, 109 S.W. 559, 211 Mo. 105, 124 Am. St. Rep. 773.

6-10. *See explanation, page iii.*

6. **Location.**

7. — **In general.**

8. — **Consent of adjacent landowners.**

9. — **Consent of public authorities.**

10. **Acquisition of and title to lands.**

11. — **Mode of acquiring lands.**

**Sup. 1926.** School district, seeking to restrain construction of cemetery as nuisance, could object only to right of holders of property to establish and operate cemetery (*Rev. St. 1919, §§ 1080, 1094*).—*Normandy Consol. School Dist. of St. Louis County v. Harral*, 286 S.W. 86, 315 Mo. 602.

12. — **Title and rights acquired.**

**Sup. 1917.** A deed conveying land to a town to be used for cemetery purposes, etc.,

*held* to create a trust.—*Adams v. Highland Cemetery Co.*, 192 S.W. 944.

A town which was made trustee of land donated for cemetery purposes *held* not entitled to convey the same to a corporation, though such conveyance would be for the benefit of the cemetery.—*Id.*

**Sup. 1919.** Where a deed is made on condition subsequent that premises should be used as a cemetery, and a city ordinance renders further performance of condition unlawful, condition is discharged, and title of grantee is no longer subject to it.—*German Evangelical Protestant Congregation of Church of Holy Ghost v. Schreiber*, 209 S.W. 914, 277 Mo. 113, certiorari dismissed (1920) *Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost*, 40 S. Ct. 9, 250 U. S. 677, 63 L. Ed. 1202.

**Sup. 1920.** A conveyance of land in consideration of \$1 and other valuable consideration, "which property was to be held and used as a burying ground," could not be canceled on the ground that the grantee failed to use the land as a burying ground, the deed containing no provision declaring it void, or providing for a re-entry, in case the defendant failed to comply with the terms of the same, and containing no condition subsequent.—*Allison v. Cemetery Caretaking Co.*, 223 S.W. 41, 283 Mo. 424.

13. — **Power to sell or mortgage or lease.**

**Sup. 1920.** *Rev. St. 1909, § 1307*, does not prohibit the voluntary sale of property belonging to a cemetery association to another association of the same kind and intended for the same purpose.—*Allison v. Cemetery Caretaking Co.*, 223 S.W. 41, 283 Mo. 424.

Where property was conveyed to a number of grantees as "stockholders of the Lawson Cemetery Company" and deed provided that the land should be divided in burial lots and conveyed by the president, a deed by such company, signed by one of the grantees elected as president, conveyed at least a good equitable title, under *Rev. St. 1909, § 2787*, whether the grantees in the original deed be considered tenants in common or copartners.—*Id.*

A deed of trust of property used as a burial ground was invalid, it not purporting on its face to have been given for the purpose of raising funds to improve or keep in repair the cemetery, and the proceeds not being used for such purpose, where grantee had notice that

prior to its being acquired by the grantor it had been platted and dedicated as a public cemetery, and lots had been sold and persons buried therein.—*Id.*

#### 14. — Abandonment.

**Sup. 1890.** Land dedicated to a city for a cemetery, which has been abandoned as a graveyard, but is used as a public park, reverts to the donor, who may recover in ejectment against the city.—*Campbell v. City of Kansas*, 13 S.W. 897, 102 Mo. 323, 10 L. R. A. 593.

In 1857, land dedicated and used as a cemetery was by ordinance "vacated for graveyard purposes." In 1866 the council, by published notice, required all who had friends buried there to move the remains. Many removals were made, but the majority of the remains were left to be taken away by the city. In 1869 it was used by the workhouse force, breaking rock. In 1870 earth was taken from it, and used to fill a street. In 1877 the city engineer was instructed by ordinance "to grade the old graveyard, and get it into shape for a public park." This was done the next year. Trees were planted, grass grown, and walks laid out. It was named and recognized by the city as a park. No visible grave or monument remained. During the final grading, in 1878, the removal of remains exhumed was stopped, and the bones of from 11 to 84 bodies reinterred, in small boxes, as near the places from which taken as possible. Small stones, bearing numbers, but no names, were at these points either put five or six inches under ground, or they had sunk to that depth at the time of the trial. *Held* sufficient evidence of abandonment.—*Id.*

**Sup. 1902** The mere passage of a city ordinance prohibiting future interments in a graveyard did not constitute an abandonment thereof, especially where the bodies were not removed for 21 years.—*Kansas City v. Scarritt*, 69 S.W. 283, 169 Mo. 471.

The proximity of land to a square donated for a graveyard does not so enhance its value as to prevent possession of the square from reverting to the original owners after an abandonment thereof for burial purposes.—*Id.*

**Sup. 1919.** A deed conveying land "for the purpose and uses of a graveyard, burying ground or cemetery, forever and for no other purpose, foreign or adverse to the one mentioned, whatsoever," *held* not to give grantor a right of re-entry on discontinuance of use of land as a cemetery.—*German Evangelical*

Protestant Congregation of Church of Holy Ghost v. Schreiber, 209 S.W. 914, 277 Mo. 113, certiorari dismissed (1920) *Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost*, 40 S. Ct. 9, 250 U. S. 677, 63 L. Ed. 1202.

#### 15. Title and rights of owners of lots in general.

**Sup. 1912.** The fact that the bodies of plaintiffs' relatives and ancestors remained buried in a plot of land which had passed from the control of plaintiff's family, although it had originally been used as a private burying ground, *held* not to establish an easement in favor of plaintiffs as to such burying ground which would entitle them to protect these graves from desecration.—*Woodbridge v. Smith*, 147 S.W. 1019, 243 Mo. 190, 40 L. R. A. (N. S.) 752.

**App. 1927.** Evidence *held* to support allegation that cemetery adjoining Catholic church was family burial ground.—*Polhemus v. Daly*, 296 S.W. 442.

#### 16. Right of burial.

*See explanation, page iii.*

#### 17. Care of grounds, lots, and graves.

**App. 1914.** Where defendant, who purchased a lot in a cemetery controlled by plaintiff, objected to paying for its care, no contract arises by implication on the theory that the work was done for defendant's benefit and with his acquiescence.—*Monett Lodge No. 106, I. O. O. F., v. Hartmann*, 170 S.W. 670, 185 Mo. App. 148.

A purchaser of a cemetery lot, who bound himself to abide by the rules of the vendor, which provided that a certain price per annum should be charged for caring for lots, is not personally liable therefor.—*Id.*

#### 18. Tombstones and monuments.

*See explanation, page iii.*

#### 19. Trespasses.

#### 20. — In general.

**App. 1927.** Evidence in injunction suit *held* to sustain finding for defendant as to charge of pasturing cemetery and burning vegetation therein.—*Polhemus v. Daly*, 296 S.W. 442.

Evidence *held* to sustain finding that tiff was dug from graves by defendant's agents

unnecessarily, to detriment of burial ground.—Id.

Plaintiffs with near relatives buried in graveyard dedicated to public use may enjoin desecration.—Id.

Evidence held to warrant finding that injunctive relief was necessary to prevent continuance of desecration of cemetery.—Id.

21. — **Disinterments.**  
*See explanation, page iii.*

22. **Offenses.**  
App. 1898. An affidavit charging defendant with using a cemetery for other purposes than a burial ground is sufficient to sustain an information for plowing it up for the purpose of cultivation.—State v. Hoffmann, 75 Mo. App. 380.

## CENSUS.

### *Scope-Note.*

INCLUDES enumeration of the inhabitants of the country or state and collection of statistics of their condition, property, commerce, etc., by public authority.

For related matters under other topics, see Descriptive-Word Index.

### *Analysis.*

1. United States census.
2. — Constitutional and statutory provisions.
3. — Officers.
4. — Making enumeration.
5. — Refusal to furnish information.
6. — Making returns.
7. — Compilation and publication of returns.
8. State census.
9. Municipal census.

1-7. *See explanation, page iii.*

1. **United States census.**

2. — **Constitutional and statutory provisions.**

3. — **Officers.**

4. — **Making enumeration.**

5. — **Refusal to furnish information.**

6. — **Making returns.**

7. — **Compilation and publication of returns.**

8. **State census.**

App. 1909. Acts 1905, p. 80, interpolating section 5895a into article 5, c. 91, Rev. St. 1899 (Ann. St. 1906, p. 2990), providing for taking of census of cities of fourth class, was intended to apply only to taking census to determine tax levy rate, and hence left section 6300 in force for other purposes.—State ex

rel. Holladay v. Rinke, 121 S.W. 159. See Census, 9 in this Digest.

9. **Municipal census.**

Sup. 1908. A city's council minutes, showing that the report of a special census enumerator was received, that a committee to audit the account was appointed, and the adoption of a motion that the committee's report "be received of 2,040 names and 19 names were rejected as a warrant for 40.40" be drawn in the enumerator's favor, insufficiently show the census returns.—State ex rel. City of Centralia v. Wilder, 109 S.W. 574, 211 Mo. 305.

Sup. 1908. Where the affidavits of the enumerators taking the census of a city as authorized by Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), providing for a census to determine whether a city shall be governed

thereby, were the only matters on file in the office of the city clerk, and no action was taken by the council accepting and approving the report of the enumerators and spreading the same on the record, as required by the statute, the requirements of the statute were not complied with, and the affidavits were not prima facie evidence of the correctness of the census.—*Flowers v. Smith*, 112 S.W. 499, 214 Mo. 98.

**Sup. 1910.** Under Rev. St. 1899, § 6300 (Ann. St. 1906, p. 3147; Rev. St. 1909, § 9639), providing that cities shall provide by ordinance for the taking of census, an ordinance authorizing the appointment of a census taker by the mayor, was not objectionable, because it did not itself name the person to take the census.—*Southworth v. City of Glasgow*, 132 S.W. 1168, 232 Mo. 108, Ann. Cas. 1912B, 1267.

**App. 1909.** A census taken by a city council, as authorized by statute, to determine whether the city had sufficient population to entitle it to a separate local option election apart from the rest of the county, could not be collaterally attacked for fraud, and hence allegations of such fraud were not a defense to an action wherein the invalidity of a local option election held throughout the county was asserted.—*State ex rel. Wirt v. Cass County Court*, 119 S.W. 1010, 137 Mo. App. 698; *State ex rel. Swarthout v. Same*, 119 S.W. 1014.

Where, though an ordinance, authorizing a census by a city to be taken to determine whether it had sufficient population to entitle it to a local option election, provided for the enumeration of all persons within the corporate limits of the city, the first section thereof ordered a census of the inhabitants, and the result showed that it was of the inhabitants alone, the census was not illegal on the ground that the ordinance provided for the enumeration of persons within the city who were not inhabitants.—*Id.*

**App. 1909.** Acts 1905, p. 80, interpolating section 5895a into article 5, c. 91, Rev. St. 1899 (Ann. St. 1906, p. 2900), providing for the taking of a census of cities of the fourth class, was intended to apply only to the taking of a census to determine the tax levy rate, and hence left section 6300 in force for the purpose of ascertaining the population of such cities for every purpose other than taxation.—*State ex rel. Holladay v. Rinke*, 121 S.W. 159, 140 Mo. App. 645.

**App. 1909.** A "census" being "an official enumeration of the inhabitants with details of sex, age, family," etc. (6 Cyc. 725), the census of a city as provided by Rev. St. 1899, §§ 3028, 6300 (Ann. St. 1906, pp. 1735, '3147), means an official enumeration of the inhabitants and a public record thereof.—*State ex rel. Ryan v. Wooten*, 122 S.W. 1101, 139 Mo. App. 221.

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Consult Pocket Part for later cases. For explanation, see page iii.

# CERTIORARI.

## *Scope-Note.*

INCLUDES review by superior courts of judicial action of inferior tribunals or officers in statutory or other proceedings not subjects of appeal or writ of error, etc., by removal and examination of records of such proceedings for correction of errors and irregularities therein; nature and scope of the remedy in general; in what cases and as to what proceedings review by certiorari is allowed; grounds for, jurisdiction to grant, and proceedings to obtain review by certiorari; requisites, issuance, and effect of writs, etc., of certiorari; quashing or dismissing such writs; returns thereto and proceedings thereon; hearing and determination thereof, and effect of decisions thereon; review of the proceedings; and costs on certiorari.

For related matters under other topics, see **Descriptive-Word Index.**

## *Analysis.*

### **I. Nature and Grounds.**

1. Nature and scope of remedy in general.
2. Constitutional and statutory provisions.
3. Availability of relief in original proceeding.
4. Existence of other remedy in general.
5. Existence of remedy by appeal or writ of error.
  - 5 (1). In general.
  - 5 (2). Inadequacy of remedy by appeal or writ of error.
6. Loss of right to other remedy.
7. Recourse to or pendency of other proceeding.
8. Adequacy of remedy by certiorari.
9. Discretion as to grant of writ.
10. Successive writs or proceedings.
11. Decisions and proceedings of courts, judges and judicial officers.
12. — Judicial nature of proceedings in general.
13. — Proceedings not according to course of common law.
14. — Courts and other tribunals subject to review.
15. — Subject-matter.
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17. — Particular proceedings in civil actions.
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20. Acts and proceedings of public officers and boards and municipalities.
21. — Judicial nature of proceedings in general.
22. — Discretionary acts.
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- ☞27. Grounds in general.
- 28. Want or excess of jurisdiction.
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- 29. Errors and irregularities.
- 31. Defenses and grounds of opposition.
- 32. Right of review.
- 33. — Persons entitled.
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- 34. — Estoppel or waiver.

**II. Proceedings and Determination.**

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- 36. Presentation of objections and exceptions in original proceeding.
- 37. Parties.
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- 39. — In general.
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- 47. Supersedeas or stay of proceedings.
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- 51. — Statement of matters not of record.
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## II. Proceedings and Determination—Continued.

- 56 (1). In general.
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  - 64 (1). In general.
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- 65. — Mode of review and trial de novo.
- 66. — Presumptions.
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- 68. — Questions of fact.
- 69. Determination and disposition of cause.
- 70. Appeal or other proceedings for review.
  - 70 (1). Decisions reviewable and jurisdiction.
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  - 70 (3). Requisites of and proceedings for transfer of cause and super-sedeas.
  - 70 (3½). Parties.
  - 70 (4). Record and assignments of error.
  - 70 (5). Scope and extent of review in general.
  - 70 (6). Presumptions.
  - 70 (7). Matters of discretion.
  - 70 (8). Questions of fact.
  - 70 (9). Determination and disposition of cause.
- 71. Costs.
- 72. Liabilities on bonds.

For related matters under other topics, see Descriptive-Word Index.

## I. NATURE AND GROUNDS.

### 1. Nature and scope of remedy in general.

Certiorari is to give relief to an injured party when the court or a body charged to have acted has proceeded without jurisdiction or has exceeded its jurisdiction or has rendered a judgment or made an order not authorized by law.

—*Sup.* 1905. State ex rel. Bentley v. Reynolds, 89 S.W. 877, 190 Mo. 578;

*App.* 1911. State ex rel. Smith v. Dykeman, 134 S.W. 120, 153 Mo. App. 416.

*Sup.* 1872. The fact that an assessor acts without jurisdiction, and is therefore

personally liable, does not prevent a review of the assessment on certiorari.—State ex rel. Lathrop v. Dowling, 50 Mo. 134.

A writ of certiorari is issued to bring up for review the record of the proceedings complained of, and is not a citation to appear and justify the action of the tribunal, as though a judgment were to be rendered against its members.—*Id.*

*Sup.* 1896. The courts have authority to mold the procedure of a writ of certiorari so as to conform to the principles and usages of law as developed under the common-law system, so far as may be consistent with the letter and intent of the existing statutory law.

—State ex rel. Harrison County Bank v. Springer, 35 S.W. 589, 184 Mo. 212.

**Sup. 1902.** The writ of certiorari reaches only questions of jurisdiction. It does not deal with the merits of controversies between the litigants. It acts upon judicial bodies and their proceedings, not upon private controversies.—State ex rel. Wabash R. Co. v. Bland, 67 S.W. 580, 168 Mo. 1.

**Sup. 1911.** Certiorari lies to review judicial proceedings, but not to review the exercise of a ministerial or legislative function of government.—State ex rel. Powell v. Shocklee, 141 S.W. 614, 237 Mo. 460.

**Sup. 1912.** Certiorari does not take the place of mandamus to compel the making of a record, but takes the record as it finds it, excluding the mere evidence which can, in the nature of things, relate to the merits only, tending to show, as it does, that the court erred in its judgment.—State ex rel. Evans v. Broadbus, 149 S.W. 473, 245 Mo. 123, Ann. Cas. 1914A, 823.

**Sup. 1914.** The office of certiorari is to bring a record of the proceedings of an inferior court or tribunal before a superior court to determine whether it acted legally, and the object of the writ is to keep inferior courts or tribunals within their jurisdiction.—State ex rel. Ruppel v. Wiethaupt, 162 S.W. 163, 254 Mo. 319.

**Sup. 1914.** In Missouri practice, the office of a writ of certiorari is the same as at common law and governed by the common-law principles if consistent with the existing statutes.—State ex rel. Barker v. Wurdeman, 163 S.W. 849, 254 Mo. 561; State ex rel. Summerson v. Goodrich, 165 S.W. 707, 257 Mo. 40.

**Sup. 1914.** The office of certiorari is to bring the record of the proceedings in an inferior court before a superior court, and the questions for determination are whether it had jurisdiction or abused such jurisdiction, or whether the proceeding is reviewable by appeal or writ of error.—State ex rel. Summerson v. Goodrich, 165 S.W. 707, 257 Mo. 40.

**Sup. 1920.** Certiorari is a remedy narrow in its scope and inflexible in its character, and cannot be made to serve the purpose of an appeal or writ of error, and all that can be done under it is either to quash or to refuse to quash the proceedings of which complaint is made.—State ex rel. Manion v. Dawson, 225 S.W. 97, 284 Mo. 490.

The nature, scope, and proper use to be made of a writ of certiorari are questions to

be determined from the common law and decisions; the common-law writ being unmodified by statute.—Id.

Certiorari will lie for the review of judicial or quasi judicial actions, but not to review ministerial, legislative, or executive actions, but the general character of the acting body does not determine the question; acts judicial in their nature being sometimes intrusted to ministerial or executive officers or bodies, and at times acts purely legislative, executive, or ministerial being intrusted to courts of general or special jurisdiction.—Id.

**Sup. 1925.** Office of writ is same as at common law, and court may adopt principles applicable to issuance as developed under common-law system.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

Certiorari directed to Court of Appeals constituted a separate action.—Id.

**Sup. 1925.** Purpose of a writ of certiorari is to bring up record for consideration of Supreme Court.—State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

“Certiorari,” “prohibition,” and “mandamus” distinguished.—Id.

**App. 1879.** The writ of certiorari is issued at common law to bring up summary proceedings had before inferior courts, where these proceedings are examinable on error or, as with us, by appeal, and the writ will not issue for purposes of review. It issues for that purpose only where there is no other mode of directly reviewing the proceedings of the inferior tribunal.—Moore v. Bailey, 8 Mo. App. 156.

**App. 1887.** In a proceeding to compel a justice of the peace to transfer a cause to the circuit court, on the ground that title to real estate is in issue, it is immaterial whether the proceeding is called certiorari or mandamus; the order directing the justice to transmit the papers in the cause to the circuit court being made in virtue of the superintending jurisdiction of the circuit court, conferred by Const. art. 6, § 23.—Bennett v. McCaffery, 28 Mo. App. 220.

**App. 1891.** The function of a writ of certiorari is to prevent inferior tribunals, where there is no appeal or writ of error, from exceeding their jurisdiction, not only where there is an entire want of jurisdiction, but where the tribunal, having jurisdiction, makes an order exceeding its powers; but it does not lie to review the merits or the pro-

priety of the action of such tribunal.—State ex rel. Reider v. Moniteau County Court, 45 Mo. App. 387.

**App. 1897.** The office of the writ of certiorari in the state is the same as at common law; that is, to bring the record of the proceedings of an inferior court or tribunal before a superior court, to determine whether it acted legally and within its jurisdiction.—State ex rel. Bristol v. Walbridge, 69 Mo. App. 657.

**App. 1900.** The function of the writ of certiorari in Missouri is the same as at common law, and it is for the purpose of bringing up the record of the proceedings of the tribunal to which it is directed.—State ex rel. Hill v. Moore, 84 Mo. App. 11.

**App. 1908.** The Court of Appeals has no rule confining the issuance or nonissuance of the writ of certiorari to cases in which there is an especial reason therefor, and where the writ has been issued, and a return has been made thereto, the court is in possession of the case, and will dispose of it on its merits.—State ex rel. Arnold v. Lichta, 109 S.W. 825, 130 Mo. App. 284.

**App. 1927.** Writ of certiorari performs same office as at common law.—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo. App. 676.

**App. 1928.** One aggrieved by final order of inferior court may bring certiorari, where no appeal or other mode of review is afforded.—Village of Grandview v. McElroy, 9 S.W. (2d) 829.

## 6-2. Constitutional and statutory provisions.

*See explanation, page iii.*

## 6-3. Availability of relief in original proceeding.

**Sup. 1897.** Certiorari will not issue to remove into the supreme court, on the ground that the court below has no jurisdiction, a proceeding in which there has been no hearing below, where the defect of jurisdiction arises from facts outside the record in the proceeding, and has not been presented to the court below.—State ex rel. Attorney General v. Gill, 39 S.W. 81, 137 Mo. 627.

## 6-4. Existence of other remedy in general.

**Sup. 1924.** Certiorari does not lie to review overruling of motion to vacate attachment dissolution bond for payment of judg-

ment obtained on original petition on ground of departure in amended petition; remedy being complete and adequate in defense of action on bond.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

**Sup. 1925.** Where defendant after entry of divorce decree moved to set the same aside, but took no appeal nor writ of error, filed no motion for new trial and made no motion in arrest of judgment, she cannot on original certiorari under Const. art. 6, § 3, avoid the judgment of divorce on the ground that the petition did not allege the residence of plaintiff within the state, one whole year next before the filing of the petition, as required by Rev. St. 1919, § 1804, or on the ground that jurisdictional finding as to residence was not incorporated in decree, the plaintiff having remarried since the decree.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580.

**Sup. 1929.** Certiorari lies where court either has no jurisdiction or acts in excess of jurisdiction and other remedies are inadequate.—State ex rel. Barlow v. Holtcamp, 14 S.W.(2d) 646.

**App. 1906.** Certiorari is not a proper remedy where another adequate remedy is available.—State ex rel. Fairbanks, Morse & Co. v. Ayers, 91 S.W. 398, 116 Mo. App. 90.

## 6-5. Existence of remedy by appeal or writ of error.

### 6-5 (1). In general.

Writ of certiorari cannot be used as a substitute for appeal or writ of error

—**Sup. 1896.** State ex rel. Alderson v. Moehlencamp, 34 S.W. 468, 133 Mo. 134; (1935) State ex rel. Bentley v. Reynolds, 89 S.W. 877, 190 Mo. 578; (1913) In re Breck, 158 S.W. 843, 252 Mo. 302; State ex rel. Tebbetts v. Holtcamp, 158 S.W. 853, 252 Mo. 323; (1925) State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597;

**App. 1908.** State ex rel. Arnold v. Lichta, 109 S.W. 825, 130 Mo. App. 284; (1911) State ex rel. Smith v. Dykeman, 134 S.W. 120, 153 Mo. App. 416.

**Sup. 1835.** In the absence of a statute and at the common law, a writ of certiorari will not be granted to remove proceedings of an inferior court after trial of judgment therein, as an appeal in such case is the proper remedy.—Boren v. Welty, 4 Mo. 250.

**Sup. 1883.** Under Rev. St. 1879, § 6967, giving an appeal to the circuit court from proceedings in the county court for the opening

of a road, certiorari will not lie to correct errors in the proceedings which can be corrected on such appeal; it not being contended that relator was prevented from taking his appeal by any misfortune, or by any fraudulent or unfair practice of his adversary.—State ex rel. Baublits v. Nodaway County Court, 80 Mo. 500.

**Sup.** Relief by certiorari will be denied in case the record discloses that relator has adequate redress by appeal.—(1891) State ex rel. Missouri Pac. Ry. Co. v. Edwards, 16 S.W. 117, 104 Mo. 125; (1900) State ex rel. Kansas & T. Coal Ry. v. Shelton, 55 S.W. 1008, 154 Mo. 670, 50 L. R. A. 798.

**Sup.** 1901. Where, on petition of the supervisor of building and loan associations to dissolve an association, the circuit judge in vacation appointed receivers therefor, any orders made by the court thereafter in term time, though made on the assumption that its decree in vacation was final, cannot be considered on certiorari, since it had complete jurisdiction of the case, and any errors in such orders were not jurisdictional, and could be corrected on appeal or writ of error.—State ex rel. Ballew v. Woodson, 61 S.W. 252, 161 Mo. 444.

**Sup.** 1914. A writ of certiorari applied for by the Attorney General issues as a matter of course if the application shows absence, excess, or abuse of jurisdiction, or absence of the right of appeal, or lack of any other adequate remedy.—State ex rel. Barker v. Wurdeman, 163 S.W. 849, 254 Mo. 561.

**Sup.** 1918. Remedy by appeal *held* adequate precluding certiorari review of action of county court in establishing public road.—State ex rel. Combs v. Staten, 187 S.W. 42. See Highways, Ⓔ60 in this Digest.

**Sup.** 1922. As no appeal or writ of error lies to review the action of the board of education when in excess of its jurisdiction, certiorari is the appropriate remedy to effectuate the purpose of Rev. St. 1919, § 11472.—State ex rel. Brown v. Board of Education of City of St. Louis, 242 S.W. 85, 294 Mo. 106.

**Sup.** 1925. Certiorari should not ordinarily be used as substitute for an appeal or writ of error.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

**Sup.** 1926. Certiorari will lie to review record as to jurisdictional matters and errors appearing on face of record which cannot be reached by appeal or writ of error.

—State ex rel. Gentry v. Westhues, 286 S.W. 396, 315 Mo. 672.

**App.** 1879. Under Act Jan. 24, 1870 (Acts 1870 [Adj. Sess.] p. 45), providing that, in all cases of appeal from the final determination of any case in a county court, such appeal shall be prosecuted to the appellate court in the same manner as is now provided by law for the regulation of appeals from justices of the peace to the circuit court, and, when any cause shall be removed into a court of appellate jurisdiction by appeal from a county court, such appellate court shall thereupon be possessed of the cause, and shall proceed to hear and determine the same anew, the circuit court has appellate jurisdiction, and, as the Legislature has provided for the exercise of this power by appeal, the writ of certiorari is no longer applicable to review an order of the court establishing a road, and a writ, having been improperly issued, was properly dismissed.—Moore v. Bailey, 8 Mo. App. 156.

**App.** 1908. Certiorari is the appropriate remedy where an inferior tribunal acts without jurisdiction, or in excess of its jurisdiction, or when within its jurisdiction its action cannot be reviewed on appeal or writ of error; but certiorari cannot be used as a substitute for appeal or writ of error, and where an inferior court has jurisdiction, and its acts can be reviewed on appeal or writ of error, certiorari will not lie.—State ex rel. Arnold v. Lichta, 109 S.W. 825, 130 Mo. App. 284.

**App.** 1909. The remedy by certiorari is not restricted to cases where no appeal lies, or where no writ of error may issue; but, where certiorari is the proper remedy in point of promptness and completeness, it affords an adequate remedy for an excess of jurisdiction, or the exercise by an inferior court or public officer of unauthorized powers.—State ex rel. Sanks v. Johnson, 121 S.W. 780, 138 Mo. App. 306.

**App.** 1912. Where a motion in the circuit court, under Rev. St. 1909, § 7573, for rule and attachment to compel a justice of the peace to allow an appeal and return his proceedings in an action, is denied, the ruling is reviewable by appeal or writ of error, and certiorari does not lie.—State ex rel. Goodman & Co. v. Circuit Court of St. Francois County, 151 S.W. 178, 168 Mo. App. 29.

Certiorari is allowed only when no appeal or writ of error or other available mode of review is afforded.—Id.

**App. 1927.** Certiorari will not lie where there is remedy by appeal, provided inferior court had jurisdiction.—*State ex rel. Shaw State Bank v. Pfeifle*, 203 S.W. 512, 220 Mo. App. 676.

**5 (2). Inadequacy of remedy by appeal or writ of error.**

**Sup. 1900.** Though Rev. St. 1899, § 278, authorizes an appeal to the circuit court from an order of the probate court revoking letters of administration, certiorari to the Supreme Court will also lie to review such order, where it was made without jurisdiction, and the remedy by appeal would not furnish adequate relief.—*State ex rel. Hamilton v. Guinotte*, 57 S.W. 281, 156 Mo. 513, 50 L. R. A. 787.

**Sup. 1924.** Writ does not lie merely because remedy by appeal is inadequate in some particulars, as in point of promptness or completeness.—*State ex rel. Lunsford v. Landon*, 265 S.W. 529, 304 Mo. 654.

Remedy is adequate, so as to preclude certiorari, if errors may be reviewed on appeal or writ of error, and court will not entertain writ merely as more prompt and less expensive remedy.—*Id.*

**Sup. 1928.** Inadequate remedy by appeal or writ of error will not bar certiorari.—*State ex rel. Shartel v. Westhues*, 9 S.W. (2d) 612.

**6. Loss of right to other remedy.**

**App. 1877.** Insufficiency of remedy resulting only from laches of party, as ground of relief. See *State ex rel. City of St. Louis v. Raum*, 3 Mo. App. 589, memorandum.

**App. 1877.** Refusal to grant certiorari after the lapse of time limited by statute for writs of error. See *State ex rel. Stackhouse v. City of St. Louis*, 4 Mo. App. 577, memorandum.

**7. Recourse to or pendency of other proceeding.**

**Sup. 1925.** Writ will lie to quash constable's ouster pending appeal from township board's judgment vacating office.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397.

**8. Adequacy of remedy by certiorari.**

*See explanation, page iii.*

**9. Discretion as to grant of writ.**

**Sup.** The writ of certiorari is not one of right, but is addressed to the sound dis-

cretion of the court.—(1001) *State ex rel. Fath v. Henderson*, 60 S.W. 1093, 160 Mo. 190; *State ex rel. Gardner v. Hall*, 221 S.W. 708, 282 Mo. 425; (1925) *State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 310 Mo. 150; (1928) *State ex rel. McFarland v. Terte*, 8 S.W.(2d) 16.

**Sup. 1920.** The discretion to grant the writ of certiorari should be warily exercised when brought by a single taxpayer, and its effect would be to nullify the valuation of property for taxation in this entire city, especially where the taxpayer had other remedies which would prevent a denial of justice, if the writ were refused.—*State ex rel. Gardner v. Hall*, 221 S.W. 708, 282 Mo. 425.

**Sup.** Writ of certiorari to review record and judgment of Court of Appeals is one of discretion.—(1921) *State ex rel. Berkshire v. Ellison*, 230 S.W. 970, 287 Mo. 654; (1927) *State ex rel. Union Biscuit Co. v. Becker*, 293 S.W. 783, 316 Mo. 805, quashing record and judgment (*App. 1925*) *Spina v. Union Biscuit Co.*, 273 S.W. 428.

**Sup. 1921.** Certiorari is a common-law, remedial writ and at the instance of a private party may issue only at the sound discretion of the court.—*State ex rel. Plummer v. Gardner*, 234 S.W. 53.

**App. 1927.** Writ of certiorari issues only on special cause shown to court to which application is made, such court being vested with discretion to grant or refuse it.—*State ex rel. Shaw State Bank v. Pfeifle*, 203 S.W. 512, 220 Mo. App. 676.

**10. Successive writs or proceedings.**

*See explanation, page iii.*

**11. Decisions and proceedings of courts, judges, and judicial officers.**

**12. — Judicial nature of proceedings in general.**

**Sup. 1925.** Act complained of must be judicial or quasi judicial.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397.

**App. 1908.** A county court, in revoking the license of a dramshop keeper, on the charge of not at all times keeping an orderly house, does not exercise any judicial function, but, in determining whether or not the charges against the keeper bring the case within its jurisdiction to revoke the license, it exercises judicial power, and if in the exercise of this function it steps outside the bounds of its jurisdiction, certiorari lies.—

State ex rel. Arnold v. Lichta, 109 S.W. 825, 130 Mo. App. 284.

A county court, in revoking a dramshop license, acts in its character as a court of record, though it acts as the administrative agent of the state, and cannot divest itself of that character; and its action is subject to review on certiorari, where it had no jurisdiction to revoke a license for the cause alleged, and where it exceeded its jurisdiction.—Id.

**App. 1914.** Certiorari does not reach mere ministerial acts; and hence, where the county court in proceedings for the annulment of a dramshop license acts ministerially and the proceeding is an investigation rather than a trial, it is not reviewable by certiorari.—State ex rel. Carman v. Ross, 162 S.W. 702, 177 Mo. App. 223.

It is only in determining its own jurisdiction to act on charges preferred in the proceeding to annul a dramshop license that a county court acts judicially; and hence it is only such determination that is reviewable on certiorari.—Id.

**App. 1926.** Certiorari will only lie for the review of judicial acts.—State ex rel. Turner v. Penman, 282 S.W. 498, 220 Mo. App. 193.

⌚13. — **Proceedings not according to course of common law.**

**Sup. 1872.** Where a new jurisdiction is created by statute, and the court or judge exercising it proceeds in a summary method, or in a new course different from the common law, certiorari lies.—State ex rel. Lathrop v. Dowling, 50 Mo. 134.

⌚14. — **Courts and other tribunals subject to review.**

Nature of act as determining whether judicial or semi-judicial function is performed, see post, ⌚21.

**Sup. 1822.** Where the chancellor has been of counsel in a cause pending before him, but refuses to certify the cause to the Supreme Court, as directed by statute, the remedy is by a writ of certiorari.—Rector v. Price, 1 Mo. 198.

**Sup. 1920.** The state board of equalization, though its acts are judicial, is not a "tribunal" within Const. art. 6, § 23, limiting the superintending control of circuit courts over all inferior tribunals.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

Const. art. 6, § 23, limiting control of circuit courts over certain inferior tribunals, does not limit the general common-law jurisdiction of circuit courts in certiorari.—Id.

The issuance of a writ of certiorari against the state board of equalization is a matter within the jurisdiction of the circuit court.—Id.

**Sup. 1926.** Appellate courts within their jurisdictions are courts of last resort.—State ex rel. Koenen v. Daues, 288 S.W. 14, quashing writ of certiorari (App.) Koenen v. Terminal Railroad Ass'n, 280 S.W. 73.

**App. 1909.** The action of the county court is under the control of superior courts, exercised by certiorari.—State ex rel. Sanks v. Johnson, 121 S.W. 780, 138 Mo. App. 306.

⌚15. — **Subject-matter.**

**Sup.** Where the statute authorizing a proceeding makes no provision for review, certiorari may be maintained for that purpose.—(1870) Snoddy v. Pettis County, 45 Mo. 361; (1872) City of St. Charles v. Rogers, 49 Mo. 530.

**Sup. 1896.** If orders of the probate court suspending an executor and appointing an administrator pending a contest of the will are not appealable, they may be reviewed by certiorari.—State ex rel. Alderson v. Moehlenkamp, 34 S.W. 468, 133 Mo. 134.

**Sup. 1917.** Supreme Court will, on certiorari, quash judgment of Court of Appeals in its opinion conflicting with previous Supreme Court opinion, but in absence of conflict, judgment is not reviewable.—State ex rel. Arel v. Farrington, 197 S.W. 912. See Courts, ⌚231(4) in this Digest.

**Sup. 1928.** Certiorari held proper to review judgment affecting election to be held before return term for appeal or writ of error.—State ex rel. Shartel v. Westhues, 9 S.W.(2d) 612.

Attorney General may attack by certiorari judgments affecting powers of secretary of state in publishing legislative proposals.—Id.

⌚16. — **Finality of determination.**

**Sup. 1891.** The order of the circuit court appointing commissioners to determine the points and manner of crossings and connections of railways, and to assess the damages, is interlocutory, and cannot be reviewed by certiorari, which only lies in case of a final

order or judgment to determine the jurisdiction of the lower court.—*State ex rel. Missouri Pac. Ry. Co. v. Edwards*, 16 S.W. 117, 104 Mo. 125.

**Sup. 1804.** Certiorari is not available to review an interlocutory order of the circuit court in a proceeding in which it has jurisdiction, before the final determination of such proceeding, on the alleged ground that the circuit court had no jurisdiction to make the order.—*State ex rel. Walbridge v. Valliant*, 27 S.W. 379, 28 S.W. 586, 123 Mo. 524.

**App. 1892.** A writ of certiorari does not lie until the proceedings sought to be reviewed are completed, and a final determination had.—*State v. Schneider*, 47 Mo. App. 669.

**App. 1908.** Under Rev. St. 1899, § 5761 (Ann. St. 1906, p. 2931), giving a mayor and city council jurisdiction to remove city officers, such body, in proceedings against relator to impeach him as police judge, entered findings expressing profound regret that the evidence showed a lack of those characteristics on relator's part which should mark a judge, and with such expression of judgment preferred to let the matter rest. *Held*, not a final judgment, and not reviewable by certiorari.—*State ex rel. Knox v. Selby*, 113 S. W. 682, 133 Mo. App. 552.

**App. 1912.** Certiorari reaches only to cases in which there are final orders or judgments.—*State ex rel. Goodman & Co. v. Circuit Court of St. Francois County*, 151 S.W. 178, 168 Mo. App. 29.

**App. 1927.** Certiorari must be founded upon final adjudication of matter involved.—*State ex rel. Shaw State Bank v. Pfeifle*, 293 S.W. 512, 220 Mo. App. 676.

#### 17. — Particular proceedings in civil actions.

**App. 1912.** Where the face of the record on certiorari to review proceedings in the county court shows jurisdiction of the court, the matter of continuance ordered by such court is a mere part of the judicial proceedings which the court had a right to determine, and its action thereon may not be reviewed.—*State ex rel. Farris v. Amick*, 142 S. W. 1104, 161 Mo. App. 13; *Id.*, 142 S.W. 1106, 1107.

#### 18. — Special proceedings.

*See explanation, page iii.*

#### 19. — Summary proceedings.

*See explanation, page iii.*

#### 20. Acts and proceedings of public officers and boards and municipalities.

#### 21. — Judicial nature of proceedings in general.

**Sup.** A county collector made a settlement with the county court, and paid over the balance found due. Thereafter a newly-created county court appointed a committee to examine the collector's accounts, which committee found that he had failed to collect a certain sum as penalties. The court, after directing the collector to pay such amount, entered judgment against him therefor. *Held*, that such proceedings were judicial, and that certiorari would lie.—(1870) *Snoddy v. Pettis County*, 45 Mo. 361; (1872) *Owens v. Andrew County Court*, 49 Mo. 372.

**Sup.** Where the determination of a question by a board or officer is of a judicial character, such determination is reviewable on certiorari.—(1871) *State*, on Petition of Taylor, v. St. Louis County Court, 47 Mo. 594; (1872) *State ex rel. Lathrop v. Dowling*, 50 Mo. 134.

**Sup. 1909.** The courts can review the authority of a mayor and city council on writs of certiorari.—*State ex rel. McEntee v. Bright*, 123 S.W. 1057, 224 Mo. 514, 135 Am. St. Rep. 552, 20 Ann. Cas. 955.

**Sup. 1911.** Rev. St. 1909, § 3674, providing that, when the county seat of a county has been destroyed by the erosion of the banks of any river, the county court may select a suitable county seat where all courts of the county shall be held, etc., excludes the theory of the existence of power to establish a temporary county seat where the courthouse has been destroyed by fire, and there are no suitable buildings at the county seat, but the act of the county court in removing the offices and records to another place on such grounds is not judicial and is not reviewable on certiorari; "judicial action" being an adjudication on the rights of the parties brought before the court by notice or process and on whose claim some decision or judgment is rendered.—*State ex rel. Powell v. Shocklee*, 141 S.W. 614, 237 Mo. 460.

**Sup. 1925.** "Exercise of judicial functions" defined.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397.

Nature of act determines whether judicial or semijudicial function is performed.—*Id.*

## 22. — Discretionary acts.

**Sup. 1869.** The action of a county court in subscribing to railroad stock and issuing bonds for payment thereof is a discretionary, and not a judicial, proceeding, and therefore not the subject of a review by writ of certiorari from the appellate court.—*In re Saline County Subscription*, 45 Mo. 52, 100 Am. Dec. 337.

## 23. — Legislative acts and ordinances.

**Sup. 1920.** Action of judge of county circuit court fixing boundaries of a drainage district under a petition asking that boundary lines of a district incorporated under Acts 1913, pp. 232–267, be extended is a legislative act, and not subject to review by writ of certiorari; the mere fact that lands of relators are incorporated thereby in no manner affecting their rights so long as their property has neither been benefited or damaged.—*State ex rel. Manion v. Dawson*, 225 S.W. 97, 284 Mo. 490.

**Sup. 1926.** Certiorari *held* not proper remedy to prevent expenditure of city funds for expenses of referendum election on ordinance.—*Hawkins v. City of St. Joseph*, 281 S.W. 420.

## 24. — Executive and ministerial acts in general.

**Sup. 1911.** The action of a county court in providing a suitable place for the recorder of deeds as authorized by Rev. St. 1909, § 10365, is not judicial, but administrative, and an order directing the recorder to remove his office and records because the courthouse at the county seat has been destroyed by fire, and there is no suitable building at the county seat in which to keep the office, is not reviewable on certiorari, whether the statute under which the court acted is valid or not.—*State ex rel. Powell v. Shocklee*, 141 S.W. 614, 237 Mo. 460.

## 25. — Appointment or removal of officers.

**Sup. 1897.** The appointment of a board that has charge of institutes where teachers for the public schools are trained and licensed is a matter of such public concern as to be cognizable by certiorari on the relation of the attorney general.—*State ex rel. Attorney General v. Harrison*, 41 S.W. 971, 43 S.W. 867, 141 Mo. 12.

Acts 1893, p. 255, § 10, requiring the county court “to appoint, by and with the advice of the county commissioners,” two members

of the institute board, calls for the performance of ministerial acts only, and hence the making of an appointment thereunder is not reviewable by certiorari.—*Id.*

**Sup. 1907.** Where relator was removed from his office of chief state grain inspector without being served with a copy of the charges and without a reasonable previous notice of hearing and an opportunity to have counsel or summon witnesses, the order of removal was without jurisdiction and was reviewable on certiorari, no other proceeding for review having been provided.—*State ex rel. Tedford v. Knott*, 105 S.W. 1040, 207 Mo. 167.

**Sup. 1914.** The action on the county court of a county in removing a member of the county highway board is reviewable on certiorari, where there is no statutory right of appeal, or writ of error, or other remedy, or where the court's action was beyond its jurisdiction, as defined by Const. art. 6, §§ 1, 36.—*State ex rel. Flowers v. Morehead*, 165 S.W. 746, 256 Mo. 683.

**Sup. 1925.** Removal from office of constable by township board of trustees subject to review in certiorari.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397.

## 26. — Audit and payment of claims.

**Sup. 1870.** The auditing of a demand against the county is not a judicial proceeding to review which certiorari can be issued.—*Phelps County v. Bishop*, 46 Mo. 68.

## 27. Grounds in general.

**Sup. 1903.** Under Const. Amend. art. 6, § 8, defining the jurisdiction of the Courts of Appeals, and excluding the cognizance of constitutional questions therefrom, where an opinion of the Court of Appeals shows that in reaching its decision no constitutional questions were considered or involved, and it does not appear that the court in any way exceeded its jurisdiction, as defined in the Constitution, certiorari will not lie to review its decision.—*State ex rel. Hobart v. Smith*, 73 S.W. 211, 173 Mo. 398.

While, under Const. Amend. art. 6, § 8, the Supreme Court has a superintending control over the Courts of Appeals, and the power to issue writs of mandamus, quo warranto, and certiorari, and to hear and determine the same, certiorari brings up only the record, and jurisdictional defects apparent therein, and will not lie to review a judgment of the Court of Appeals on the merits.—*Id.*



**Sup. 1924.** Writ of certiorari performs same office in Missouri as at common law, and is applicable, where court to which directed has no jurisdiction, or acts in excess or abuse of its jurisdiction, or there is no remedy by appeal or writ of error.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

28. Want or excess of jurisdiction.

28 (1). In general.

**Sup. 1891.** Certiorari is the proper writ on which to inquire into the jurisdiction of the lower tribunal or officer.—State ex rel. Missouri Pac. Ry. Co. v. Edwards, 16 S.W. 117, 104 Mo. 125.

**Sup. 1925.** Writ will lie where attempt to exercise unauthorized powers is evident.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

**Sup. 1929.** Certiorari lies where court either has no jurisdiction or acts in excess of jurisdiction.—State ex rel. Barlow v. Holtcamp, 14 S.W.(2d) 646.

**App. 1908.** A writ of certiorari is not confined to cases where there is an entire want of jurisdiction, but may be resorted to where, having jurisdiction, the tribunal makes an order exceeding its powers, but not to cases when no order is made.—State ex rel. Knox v. Selby, 113 S.W. 682, 133 Mo. App. 552.

**App. 1909.** Certiorari is the proper remedy to restrain inferior courts or public officers when they act in excess of their jurisdiction.—State ex rel. Sanks v. Johnson, 121 S.W. 780, 138 Mo. App. 306.

**App. 1914.** The purpose of the writ of certiorari is to bring up the records of inferior tribunals, such as county courts, to determine whether they have acted within their jurisdiction.—State ex rel. Rippee v. Forest, 162 S.W. 706, 177 Mo. App. 245.

**App. 1926.** The chief purpose of the writ of certiorari is to keep inferior courts within the bounds of their jurisdiction.—State ex rel. Turner v. Penman, 282 S.W. 498, 220 Mo. App. 193.

28 (2). Decisions and proceedings of courts, judges and judicial officers.

**Sup. 1890.** Where the lower court confessedly has jurisdiction of the cause, an application for certiorari will be denied, as it only reaches jurisdictional errors in the record.—State ex rel. Teasdale v. Smith, 14 S.W. 108, 101 Mo. 174, following (1876) Hannibal & St. J. R. Co. v. State Board, 64 Mo. 294.

**Sup. 1890.** A writ of certiorari from the Supreme Court to the judges of the Kansas City Court of Appeals will not be granted to review a case in which that court had jurisdiction.—State ex rel. Teasdale v. Smith, 14 S.W. 108, 101 Mo. 174.

**Sup. 1903.** The writ of certiorari may be resorted to, not only in cases where it is alleged that the lower court is absolutely without any jurisdiction whatever, but it also may reach and afford a remedy in cases where such court has jurisdiction, but undertakes to exercise unauthorized powers.—State ex rel. Scott v. Smith, 75 S.W. 586, 176 Mo. 90.

**Sup. 1917.** Supreme Court will quash record of Court of Appeals on certiorari where amount involved exceeded its jurisdiction, regardless of whether it followed the last decisions of the Supreme Court.—State ex rel. Long v. Ellison, 199 S.W. 984, 272 Mo. 571, quashing record in Court of Appeals Clark v. Long, 196 S.W. 409.

**App. 1916.** Failure of Court of Appeals to follow ruling of Supreme Court, as required by Const. Amend. 1884, § 6, held a jurisdictional excess which the Supreme Court on certiorari may remedy by quashing the judgment of the Court of Appeals.—Iba v. Chicago, B. & Q. R. Co., 182 S.W. 135, 192 Mo. App. 297.

28 (3). Acts and proceedings of public officers and boards.

**App. 1916.** Though board of arbitration, convened by county superintendent of schools to settle boundary changes affecting school districts, is not required to make record of proceedings other than its finding, certiorari will lie to review and set aside its proceedings for lack of or excessive exercise of jurisdiction.—State ex rel. King v. Moreland, 189 S.W. 602.

29. Errors and irregularities.

**Sup. 1910.** Certiorari is not limited to reviewing questions of jurisdiction, but lies to review any error appearing on the face of the record which cannot be reached by appeal or writ of error.—State ex rel. Iba v. Mosman, 133 S.W. 38, 231 Mo. 474.

**Sup. 1914.** Under Const. art. 6, § 6, and Amendment of 1884, § 8, the Supreme Court will on certiorari quash a judgment of a court of appeals, where it refused to follow the last previous rulings of the Supreme Court.—State ex rel. United Rys. Co. v. Reynolds, 165 S.W. 729, 257 Mo. 19, quashing certiorari (1913) Nelson v. United Rys. Co. of St. Louis, 158 S.W. 446, 176 Mo. App. 423.

**App. 1909.** An inferior tribunal or officer having jurisdiction to act, and invested with discretionary powers, cannot be controlled by certiorari by a superior tribunal, however improperly the discretionary power has been exercised, but an inferior court has no unrestrained discretion to act in matters over which it has no jurisdiction.—*State ex rel. Sanks v. Johnson*, 121 S.W. 780, 138 Mo. App. 306.

### ← 31. Defenses and grounds of opposition.

*See explanation, page iii.*

### ← 32. Right of review.

### ← 33. — Persons entitled.

#### ← 33 (1). In general.

**Sup. 1914.** Where relator sued two railroad companies for injuries resulting in the death of a passenger and during the trial dismissed as to one of the defendants for a failure to prove a cause of action, the rights of the railroad companies inter se became immaterial, and relator had no interest in such issue.—*State ex rel. Mersereau v. Ellison*, 168 S.W. 744, 260 Mo. 129.

#### ← 33 (2). Decisions and proceedings of courts, judges and judicial officers.

**Sup. 1917.** Where mandamus is awarded against a probate judge to require appointment of an individual as an administrator, the judge is such an interested party that he may bring certiorari to review the order.—*State ex rel. Thompson v. Norton*, 191 S.W. 429, 269 Mo. 562.

#### ← 33 (3). Acts and proceedings of public officers and boards and municipalities.

**App. 1908.** A resident and owner of animals has such a personal interest as entitles him to apply for a writ of certiorari to review the election on a proposition to restrain animals from running at large.—*State ex rel. Martin v. Wilson*, 108 S.W. 128, 129 Mo. App. 242.

### ← 34. — Estoppel or waiver.

**Sup. 1920.** Where plaintiff consented to remittitur required by the Court of Appeals as condition to affirmance of a judgment in his favor, he cannot, on defendant's application for certiorari to quash the decision on the ground of conflict with opinions of the Supreme Court, attack the requirement as to remittitur.—*State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds*, 226 S.W. 564, 286 Mo. 204, modifying opinion, *Schulz v. St. Louis, I. M. & S. Ry. Co.*, 223 S.W. 757.

## II. PROCEEDINGS AND DETERMINATION.

### ← 35. Jurisdiction.

**Sup. 1872.** Proceedings for a certiorari must be commenced in the circuit court, unless, for special reasons, complete justice cannot be done, in which case proceedings may be commenced in the Supreme Court.—*Owens v. Andrew County Court*, 49 Mo. 372.

**Sup. 1873.** Under Act 1859 (Sess. Acts 1859-60, p. 10) the clerk of the Kansas City court of common pleas has authority to issue writs of certiorari.—*Hopkins v. Seiger*, 53 Mo. 232.

**Sup. 1876.** The Supreme Court having no jurisdiction to review the judgment of an inferior court in a contest of the election of an officer, other than a state officer, it cannot assume such jurisdiction by certiorari.—*Britton v. Steber*, 62 Mo. 370.

**Sup. 1893.** Where, on application to the Supreme Court for a writ of certiorari, it appears that the circuit court had the power to issue the writ as prayed for, and that the cause was not one of more than ordinary importance, the writ will be denied.—*State ex rel. Brennan v. Walbridge*, 22 S.W. 893, 116 Mo. 656.

**Sup. 1914.** A judge of the Supreme Court may, under Const. art. 6, § 8, Amendment of 1884, issue in vacation certiorari to a court of appeals to quash its judgment.—*State ex rel. United Rys. Co. v. Reynolds*, 165 S.W. 729, 257 Mo. 19, quashing certiorari (1913) *Nelson v. United Rys. Co. of St. Louis*, 158 S.W. 446, 176 Mo. App. 423.

**Sup. 1920.** Proceedings for certiorari should be commenced in the circuit court unless for special reason complete justice cannot be done, in which case the proceedings may be commenced in a Court of Appeals or in the Supreme Court.—*State ex rel. Gardner v. Hall*, 221 S.W. 708, 282 Mo. 425.

A writ of certiorari directed against the state board of equalization cannot be considered a transitory action.—*Id.*

A writ of certiorari directed to the state board of equalization comprehends all the essential elements of a suit, a moving and an adverse party, and the necessity of a decision determining the issue, and may be classified as a suit within the meaning of the venue statute (Rev. St. 1909, § 1751), though it is not a "suit" in the ordinary acceptance of the term.—*Id.*

The writ of certiorari, though not an ordinary summons, performs the same office, and each requires the act of a court to render it effective under Const. art. 6, § 38, so that the proceeding may be considered as a "suit commenced by summons" to which the venue statute (Rev. St. 1909, § 1751) applies, though an ordinary summons is directed to the officer under section 1759.—Id.

Under Const. art. 10, § 18, and Rev. St. 1909, c. 117, art. 4, the state board of equalization resides and can be found only in the state capital, so that certiorari can be brought against it only in that county, under Rev. St. 1909, § 1751, requiring suits to be brought in the county where defendant resides or where plaintiff resides and the defendant may be found.—Id.

Certiorari questioning the validity of the action of the board of equalization in fixing the value of property for purposes of taxation is not a suit whereby title to real estate may be affected, or for the enforcement of the lien of a special tax bill thereon, and therefore cannot be brought within the county where the property taxed is located, under Rev. St. 1909, § 1753, as amended by Laws 1915, p. 224.—Id.

Though certiorari to review an order of the state board of equalization, equalizing assessment of property for taxation, is, correctly speaking, a local action, it accrues, not at the place of the taxpayer's residence or the location of the property equalized, but at the state capital where the board sat and made the order complained of.—Id.

Since the officers constituting the board of equalization are the executive heads of departments of the state government, whose duties require their presence at the capital, circuit courts elsewhere should not grant certiorari against them, requiring their attendance in other places to the interference with their duties and the prejudice of the public welfare.—Id.

### 36. Presentation of objections and exceptions in original proceeding.

Sup. 1914. Where, in an action by a common laborer for personal injuries confining him to bed for more than three weeks, there was no evidence of value of his time lost, a judgment of the Court of Appeals affirming the judgment for plaintiff on a verdict rendered under instructions authorizing a finding for time lost would not be quashed as conflicting with prior decisions of the Su-

preme Court, in the absence of any requested charge limiting a recovery to nominal damages for loss of time.—State ex rel. United Rys. Co. v. Reynolds, 165 S.W. 729, 257 Mo. 19, quashing certiorari (1913) Nelson v. United Rys. Co. of St. Louis, 158 S.W. 446, 176 Mo. App. 423.

Sup. 1920. Contentions not presented to or decided by the Court of Appeals cannot be made the basis of a ruling quashing its record on certiorari, on the ground its opinion is in conflict with controlling decisions of the Supreme Court.—State ex rel. City of St. Joseph v. Ellison, 223 S.W. 671, quashing certiorari (App. 1919) Bradford v. City of St. Joseph, 214 S.W. 281.

Sup. 1923. An alleged error not assigned or considered by the Court of Appeals cannot be reviewed by the Supreme Court on certiorari.—State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384, quashing certiorari (App. 1922) Burke v. Shaw Transfer Co., 243 S.W. 449.

### 37. Parties.

Sup. 1925. Party or parties defendant prerequisite to issuance of writ.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

Court held without power to issue writ where relator deceased when writ applied for.—Id.

Sup. 1925. Township not necessary party to proceedings to quash ouster of constable and appointment of successor by township board.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

App. 1897. A writ of certiorari cannot be directed to an ex-official, after he has parted with the record sought to be brought up.—State ex rel. Clark v. Souders, 69 Mo. App. 472.

### 38. Time of taking proceedings.

#### 39. — In general.

Sup. 1927. Delay or four months after order removing cause to federal court, before applying for writ of certiorari did not preclude granting of writ, where no injustice resulted.—State ex rel. Hancock v. Falkenhainer, 291 S.W. 466, 316 Mo. 651.

Sup. 1927. Timeliness of application for certiorari on ground of illegality of Court of Appeals' actions as constituted was foreclosed by issuance of writ. (Per Walker, C. J., and Graves, J.)—State ex rel. Allen v. Trimble,

207 S.W. 378, 317 Mo. 751, quashing record (1920) *Allen v. Best*, 279 S.W. 728, 220 Mo. App. 1041.

Court of Appeals' contravention of Supreme Court ruling by proceeding with one regular judge and special judge agreed on by parties *held* timely raised in petition for certiorari. (Per Walker, C. J., and Graves, J.)—*Id.*

**Sup. 1927.** Timely application must be made to Court of Appeals for stay of mandate pending application for certiorari for conflict of decisions.—*State ex rel. Al. G. Barnes Amusement Co. v. Trimble*, 300 S.W. 1064, 318 Mo. 274.

#### 40. — Constitutional and statutory limitations.

**Sup. 1921.** Under Rev. St. 1919, § 1520, requiring the clerk of the Supreme Court to certify a copy of the opinion to the circuit court within 30 days after filing, made applicable to the Court of Appeals by Const. art. 6, § 15, 30 days after the denial of a rehearing is, in ordinary cases, a reasonable time for aggrieved parties to apply to the Supreme Court for a writ of certiorari.—*State ex rel. Berkshire v. Ellison*, 230 S.W. 970, 287 Mo. 654.

#### 41. — Laches.

**Sup. 1921.** Where an application for a writ of certiorari to review a judgment of the Court of Appeals was made more than a year after the opinion of the Court of Appeals was handed down, more than nine months after the denial of a rehearing, and some seven months after the mandate had gone down and been acted upon by the entry of the judgment directed by the Court of Appeals, and though it was claimed that the delay was due to an attempt by mandamus to compel the writing of the opinion below so as to state the facts, the application was barred by laches.—*State ex rel. Berkshire v. Ellison*, 230 S.W. 970, 287 Mo. 654.

As to laches in applying for certiorari to review an opinion of the Court of Appeals, the opinion was not a finality until after a motion for rehearing was overruled, but thereafter it was a finality so far as that court was concerned, unless it changed its opinion and judgment of its own motion.—*Id.*

A party aggrieved by a judgment of the Court of Appeals should be granted reasonable time to apply to the Supreme Court for a writ of certiorari and procure a ruling of

that court thereon if notice is given of the desire to apply for such writ.—*Id.*

**Sup. 1925.** Defendant in divorce action who took no steps to procure setting aside of decree or review thereof until the term of court at which decree was rendered had passed, and until after remarriage of plaintiff, was guilty of such laches as to preclude relief on original certiorari in Supreme Court.—*State ex rel. Kennedy v. Hogan*, 267 S.W. 619, 306 Mo. 580.

**Sup. 1925.** Application for certiorari not delayed too long when within 30 days of overruling motion for rehearing.—*State ex rel. Scott v. Trimble*, 272 S.W. 66, 308 Mo. 123, quashing record (1924) *State ex rel. and to Use of Clinkscales v. Scott*, 261 S.W. 680, 216 Mo. App. 114.

**Sup. 1927.** Generally, mere lapse of time will not preclude granting writ of certiorari.—*State ex rel. Hancock v. Falkenhainer*, 291 S.W. 466, 316 Mo. 651.

**Sup. 1927.** Application in Court of Appeals for certiorari for conflict of decisions, filed more than 30 days after overruling motion for rehearing, *held* too late, notwithstanding motion to certify case to Supreme Court.—*State ex rel. Al. G. Barnes Amusement Co. v. Trimble*, 300 S.W. 1064, 318 Mo. 274.

#### 42. Petition or other application.

##### 42 (½). Authority or competency to make.

**Sup. 1925.** Certiorari is a discretionary writ and application must be made for it.—*State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 310 Mo. 150.

##### 12 (1). Formal requisites in general.

*See explanation, page iii.*

##### 42 (2). Signature and verification.

*See explanation, page iii.*

##### 42 (3). Sufficiency of allegations in general.

**Sup. 1915.** The issuance of an order and notice to show cause why a writ of certiorari should not issue *held* not to prevent refusal of the application for the writ if a proper showing be not made.—*State ex rel. McCormack v. McPheeters*, 178 S.W. 761.

**Sup. 1915.** Under rules 13, 35 (169 S.W. ix, xii), enough of the record necessary to present the point for the decision must, on certiorari to quash a judgment of a Court of Appeals, be presented in printed abstract.—*State ex rel. Pedigo v. Robertson*, 181 S.W.

987, dismissing certiorari *State v. Pedigo*, 176 S.W. 556, 190 Mo. App. 293.

**Sup. 1924.** Certiorari will be denied, under rule 34 of the Supreme Court, where cases cited in petition show no rule of law conflicting, on facts before it, with decision of Court of Appeals sought to be quashed.—*State ex rel. Smith v. Allen*, 267 S.W. 843, quashing certiorari (App.) *Smith v. Donk Bros. Coal & Coke Co.*, 260 S.W. 545.

**Sup. 1927.** Certiorari petition alleging illegality of Court of Appeals' actions and supporting suggestions urging contravention of Supreme Court ruling in case not cited in petition *held* sufficient (Supreme Court rule 34). (Per Walker, C. J., and Graves, J.)—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record (1926) *Allen v. Best*, 279 S.W. 728, 220 Mo. App. 1041.

**App. 1917.** Conclusions in petition for writ of certiorari that certain matters are insufficient, or improper, or void, or illegal should be accompanied by allegations showing wherein or why matters complained of were improper.—*State ex rel. Morrison v. Sims*, 201 S.W. 910.

42 (4). Allegations of error.

**Sup. 1919.** On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, relator assumes the burden to point out previous opinions of the Supreme Court impugned by the alleged conflicting decision of the Court of Appeals.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S.W. 967.

**Sup. 1922.** Supreme Court Rule 34 (228 S.W. x), requiring that the petition for a writ of certiorari to quash the judgment of a Court of Appeals for failure to follow the last controlling decisions of the Supreme Court shall concisely set out the issue presented to the Court of Appeals, and show how the conflicting ruling arose, does not require a statement of the facts in the case, but merely requires a statement of the issues presented by the Court of Appeals, the rulings thereon, and wherein and in what manner the rulings conflict with the decisions of the Supreme Court.—*State ex rel. Nafziger Baking Co. v. Trimble*, 247 S.W. 146.

42 (5). Excusing failure to appeal.

*See explanation, page iii.*

42 (6). Affidavit of merits and good faith.

*See explanation, page iii.*

42 (7). Records or exhibits.

**Sup. 1915.** On certiorari to quash a judgment of one of the Courts of Appeals, the opinion of the Court of Appeals, as well as its entries and judgment, are part of the record, and where not contained in a printed abstract, as required by Supreme Court rules 13, 35 (169 S.W. ix, xii), the writ must be dismissed.—*State ex rel. Pedigo v. Robertson*, 181 S.W. 987, dismissing certiorari *State v. Pedigo*, 176 S.W. 556, 190 Mo. App. 293.

42 (8). Defects and objections.

**Sup. 1911.** Where respondents in certiorari made a return without objecting to the want of sufficient interest of relators to maintain the proceedings, and relators moved for judgment on the pleadings, respondents under Rev. St. 1909, § 1804, waived the question of relators' interest in the proceedings, though the motion for judgment is treated as a general demurrer searching the whole record and attacking the first fatal defect.—*State ex rel. Powell v. Shocklee*, 141 S.W. 614, 237 Mo. 460.

**Sup. 1927.** Court of Appeals' jurisdiction must be determined on certiorari, despite ordinarily fatal irregularities in presentation of application. (Per Walker, C. J., and Graves, J.)—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record (1926) *Allen v. Best*, 279 S.W. 728, 220 Mo. App. 1041.

42 (9). Amendment.

*See explanation, page iii.*

43. Bond or other security and payment of costs and fees.

*See explanation, page iii.*

44. Allowance and issuance of writ.

**Sup. 1873.** Under Sess. Acts 1859-60, p. 10, the clerk of the Kansas City court of common pleas has authority to issue writs of certiorari.—*Hopkins v. Seiger*, 53 Mo. 232.

**Sup. 1900.** After a writ of certiorari has been issued, and the record of the inferior court has been certified in response thereto, it is too late for the court to then determine whether the writ was awarded in the proper exercise of its discretion.—*State ex rel. Hamilton v. Guinotte*, 57 S.W. 281, 156 Mo. 513, 50 L. R. A. 787.

**Sup. 1914.** Judge of Supreme Court may issue in vacation certiorari to court of appeals to quash its judgment.—*State ex rel. United Rys. Co. v. Reynolds*, 165 S.W. 729. *See Certiorari, 35 in this Digest.*

**Sup. 1925.** Proceeding commenced by filing petition or application in proper court.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

**Sup. 1925.** Irregularity of issuance waived by adoption or recognition of writ by court and parties throughout proceeding.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

#### —45. Form and requisites of writ.

**Sup. 1927.** On certiorari to Court of Appeals, Supreme Court may regulate command of writ in accordance with purpose.—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, quashing record and judgment (App. 1925) Spina v. Union Biscuit Co., 273 S.W. 428.

#### —46. Service of writ or notice of proceedings.

**Sup. 1920.** The writ of certiorari should be served by an officer charged by law with the execution of process the same as the summons, which is repeatedly termed an original writ by Rev. St. 1909, c. 21, art. 4.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

#### —47. Supersedeas or stay of proceedings.

**Sup. 1921.** The filing of an application to the Supreme Court for a writ of certiorari and the granting of the writ thereon stays all further proceedings in the Court of Appeals.—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654.

**App. 1892.** A writ of certiorari, issued by the circuit court to the county court, pending applications for dramshop licenses, to remove the proceedings on such applications, does not operate to stop further proceedings, and the members of the county court are not guilty of contempt in issuing licenses after the issuance of the certiorari.—State v. Schneider, 47 Mo. App. 669.

#### —48. Return and record.

##### —49. — In general.

**Sup. 1910.** The return to certiorari is confined to the record called for by the writ, and the only duty devolving on the court to which the writ is addressed is to send up the record called for, the validity of which will be adjudged by what it shows on its face.—State ex rel. Attorney General v. Patterson, 129 S.W. 894, 229 Mo. 364.

**Sup. 1925.** Filing of return to writ by respondents waives defects in issuance.—

State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

**Sup. 1927.** On failure to file printed abstract of record, proceedings for certiorari to review opinion of Court of Appeals cannot be considered (Supreme Court Rules 11–13, 33).—State ex rel. Egan v. Trimble, 291 S.W. 468.

Supreme Court rules, requiring filing of abstract of record on certiorari to Court of Appeals, cannot be waived (Supreme Court Rules 11–13, 33).—Id.

**Sup. 1927.** Return to writ of prohibition has no place on certiorari to review Court of Appeals record (Const. Amend. 1884, § 8).—State ex rel. Johnson v. Arnold, 297 S.W. 59, 317 Mo. 858.

**App. 1927.** Only return that can be made to writ of certiorari is record called for by writ itself.—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo. App. 676.

#### —50. — Scope and contents of record or transcript.

**Sup. 1875.** The writ of certiorari merely brings up the record and proceedings of the lower court.—Rogers v. Clinton County Court, 60 Mo. 101.

**Sup. 1896.** That petitioner, on certiorari, is permitted to read in evidence, without objection from a so-called bill of exceptions, signed by the members of the board, and purporting to contain the evidence adduced by him before it, and its action thereon, does not make it part of the record.—Blocklock v. Board of Equalization of Gentry County, 36 S.W. 1132.

**Sup. 1905.** The writ of certiorari brings up only the record proper of the tribunal to which it is addressed, and does not bring up the evidence on which the judgment of that tribunal is founded.—State ex rel. Bentley v. Reynolds, 89 S.W. 877, 190 Mo. 578.

**Sup. 1907.** Certiorari to quash the record of a city board of health, declaring a manufacturing plant a nuisance, brings up for review only the record proper, and does not bring up the evidence, and the court cannot determine whether the evidence justified the conclusion of the board in adjudging the plant a nuisance.—State ex rel. Parker-Washington Co. v. City of St. Louis, 105 S.W. 748, 207 Mo. 354, 123 Am. St. Rep. 376.

**Sup. 1915.** On certiorari to Court of Appeals, opinion below *held* conclusive that facts warranted instruction, but whether the peti-

tion warranted it should be determined from the petition; it being as much a part of the record as the opinion.—State ex rel. National Newspapers' Ass'n v. Ellison, 176 S.W. 11.

**Sup. 1916.** Where opinion of Court of Appeals expressly referred to order of publication of city's ordinance and made it basis of distinct holding, order of publication was incorporated in opinion and was to be treated and examined on certiorari as part of it.—State ex rel. Hayes v. Ellison, 191 S.W. 49.

**Sup. 1920.** In certiorari to review the opinion of a Court of Appeals, reference in the opinion to a written document in the case, such as a pleading or an instruction, makes it as much a part of the opinion as if fully written out therein, and the petition may be considered in full.—State ex rel. Kansas City v. Ellison, 220 S.W. 498, 281 Mo. 667, quashing record of Court of Appeals (App. 1919) Barnett v. Kansas City, 214 S.W. 240.

**Sup. 1922.** In certiorari to review opinion of the Court of Appeals, where there was reference in the opinion to an instruction which is not set out in the record before the Supreme Court, the record before the Court of Appeals may be looked to and the instruction examined.—State ex rel. Vogt v. Reynolds, 244 S.W. 929, 295 Mo. 375, quashing record (App. 1920) Vogt v. United Rys. Co. of St. Louis, 226 S.W. 75.

**Sup. 1923.** On certiorari to quash the record of the Court of Appeals on the ground that its decision construing an insurance policy was contrary to prior decisions of the Supreme Court, where the decision of the Court of Appeals referred to and quoted freely from the policy and by-laws of the insurance company, the contract and by-laws were thereby drawn into the opinion by reference and were for consideration by the Supreme Court as if they had been written into it in full.—State ex rel. Western Automobile Ins. Co. v. Trimble, 249 S.W. 902, 297 Mo. 659.

**Sup. 1923.** On certiorari to review the judgment of a Court of Appeals, written documents referred to in the appellate court's opinion are considered to be within the opinion as fully as if written out therein, and are to be examined as part of opinion under review.—State ex rel. Selbel v. Trimble, 253 S.W. 215, 299 Mo. 164, quashing certiorari (App.) Price v. Selbel, 253 S.W. 212.

**Sup. 1923.** The Supreme Court, after it acquires jurisdiction of an alleged conflict case, may refer to incorporated matter con-

tained in the opinion of the Court of Appeals, for the details of the case in that court.—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing opinion (App. 1922) Vulgamott v. Payne, 245 S.W. 592.

**Sup. 1924.** On certiorari to quash record of Court of Appeals, on ground of conflict with decisions of Supreme Court where that court in its opinion referred to a cross-bill, Supreme Court is authorized to look at cross-bill as shown in the record.—State ex rel. John Hancock Mut. Life Ins. Co. of Boston v. Allen, 267 S.W. 832, 306 Mo. 197, quashing writ of certiorari (App. 1923) Cradick v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 256 S.W. 501.

**Sup. 1925.** Record in certiorari to quash opinion of Court of Appeals should contain only petition, exhibits, and subsequent proceedings.—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536.

**Sup. 1925.** Any instrument referred to in opinion of Court of Appeals becomes part of record to be considered by Supreme Court.—State ex rel. Hirsch v. Allen, 274 S.W. 353, dismissing certiorari (App. 1924) State v. Hirsch, 260 S.W. 557.

**Sup. 1926.** On certiorari to quash opinion of Court of Appeals as contravening controlling decision of Supreme Court, opinion of Court of Appeals constitutes the record.—State ex rel. Taylor v. Dunes, 281 S.W. 398, 313 Mo. 200, quashing writ of certiorari (App. 1925) Taylor v. Security Ben. Ass'n of Topeka, Kan., 270 S.W. 132.

**Sup. 1927.** On certiorari Supreme Court should go to opinion of Court of Appeals for facts.—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 376 Mo. 865, quashing record and judgment (App. 1925) Spina v. Union Biscuit Co., 273 S.W. 428.

On certiorari, Supreme Court will examine matter incorporated by reference in opinion of Court of Appeals if subject-matter of ruling therein.—Id.

Opinion of Court of Appeals that petition contained three assignments of negligence held to make petition part of opinion and record before Supreme Court on certiorari.—Id.

**Sup. 1927.** Supreme Court acquiring jurisdiction on ground of conflict can take cognizance of written documents referred to in Court of Appeals' opinion.—State ex rel. Locke v. Trimble, 298 S.W. 782.

**Sup. 1928.** Supreme Court, on certiorari, will examine petition, insufficiency of which constituted basis for judgment of Court of Appeals.—State ex rel. Levine v. Trimble, 8 S.W.(2d) 927.

**App. 1895.** While in compliance with a writ of certiorari to the mayor, requiring him to certify all the proceedings and evidence had and taken on the trial of relator on charges of misconduct, incompetency, and neglect of duty in his office of health commissioner, the evidence was returned to the circuit court, it was no part of the record, and not properly before the court.—State ex rel. Brennan v. Walbridge, 62 Mo. App. 162.

**App. 1905.** In certiorari to remove to the St. Louis Court of Appeals the record of the excise commissioner in relation to granting a dramshop license, the court, on suggestion of a diminution of the record, cannot compel the commissioner to make a record of certain alleged findings and certify them as part of the record.—State ex rel. Sager v. Mulvihill, 88 S.W. 773, 113 Mo. App. 324.

⌘51. — **Statement of matters not of record.**

**Sup. 1896.** That petitioner, on certiorari, is permitted to read in evidence, without objection, from a so-called bill of exceptions, signed by the members of the board, and purporting to contain the evidence adduced by him before it, and its action thereon, does not make it part of the record.—Ward v. Board of Equalization of Gentry County, 36 S.W. 648, 135 Mo. 309.

**Sup. 1896.** Certiorari to review refusal of bail by the county court cannot bring up the evidence adduced before it on hearing of the writ of habeas corpus to obtain bail, the court being of statutory origin, and no provision having been made for preserving evidence taken before it and making it part of its record.—State ex rel. Mollineaux v. Madison County Court, 37 S.W. 1126, 136 Mo. 323.

**Sup. 1913.** In response to a writ of certiorari, the duty of the court and clerk to which the writ is addressed is confined to sending up the record called for, the legality of which will be determined by the Supreme Court.—In re Breck, 158 S.W. 843, 252 Mo. 302; State ex rel. Tebbetts v. Holcamp, 158 S.W. 853, 252 Mo. 333.

⌘52. — **Bill of exceptions.**

**App. 1890.** While in some cases a bill of exceptions may preserve proceedings otherwise not of record and make them a part

thereof, when there is no provision for a bill of exceptions, the record proper is all that can be reached by a writ of certiorari.—State ex rel. Harrah v. Cauthorn, 40 Mo. App. 94.

⌘53. — **Making, form, and requisites.**

**Sup. 1921.** Certiorari is a common-law, remedial writ, and at the instance of a private party may issue only at the sound discretion of the court, and when issued the court may fix such date for answer and return as it may deem proper.—State ex rel. Plummer v. Gardner, 234 S.W. 53.

**App. 1897.** The legal control and custody of the records of the county court of Crawford county belonged to the court as constituted at the time a writ of certiorari was applied for, and hence no return can be required of ex-members of such court.—State ex rel. Clark v. Souders, 69 Mo. App. 472.

**App. 1897.** In obedience to a writ of certiorari to review proceedings to change the boundary line between school districts under the school law (Rev. St. 1889, § 7972), the defendant county commissioner made return that he knew nothing of the matter referred to in the writ, and that he had no papers or records connected therewith, except one, which he certified to the court, and which was a mere statement or petition purporting to be signed by certain qualified voters of the two school districts, and which merely recited the action of the two districts and requested the county commissioner to act in the premises as the statute provided. *Held*, that the return brought up no matter upon which the circuit court could act, and relator's motion to quash "the pretended order changing the boundary line" was properly overruled.—State ex rel. School Dist. v. Williams, 70 Mo. App. 238.

**App. 1917.** In certiorari to county superintendent of schools to quash proceedings for organization of consolidated school district, jurisdiction of such inferior tribunal as one concerned in proceeding need not appear on face of any special paper, but only need appear somewhere in record.—State ex rel. Morrison v. Sims, 201 S.W. 910.

⌘54. — **Defects and objections.**

**Sup. 1927.** By motion for judgment on pleadings and return of respondents, relator confessed correctness of orders shown in respondents' return and truth of facts well pleaded therein.—State ex rel. Jones v. Smiley, 300 S.W. 459, 317 Mo. 1283.



**Sup. 1928.** Relator's motion for judgment admits substantive facts pleaded in return to writ of certiorari.—State ex rel. U. S. Bank v. Gehner, 5 S.W.(2d) 40, 319 Mo. 1048.

**App. 1897.** A court composed of several judges can only speak and act as such through the medium of a majority of the members. Hence, when only one of the members of such court is made a party defendant in certiorari, a return by such member is insufficient.—State ex rel. Clark v. Souders, 69 Mo. App. 472.

55. — Amendment and further return.

**Sup. 1896.** A writ of certiorari to review the action of a public board calls for an exhibit of the record of that body bearing on the questions involved, and, if a portion of such record is omitted from the return, the court may properly permit the respondents to supply it by amendment.—State ex rel. Harrison County Bank v. Springer, 35 S.W. 589, 134 Mo. 212.

56. — Conclusiveness and effect.

56 (1). In general.

**App. 1928.** In certiorari proceeding jurisdiction of respondent board of arbitration to change school district boundaries must appear from face of return (Rev. St. 1919, § 11201).—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Ingram, 2 S.W. (2d) 113.

56 (2). Contradicting return.

*See explanation, page iii.*

57. — Questions presented for review.

**Sup. 1870.** Where, on certiorari to review the action of the state board of equalization, it appears that the board was required by law to keep a full record of its proceedings and decisions, but not of the evidence adduced before it, and the petition alleges that the board, without evidence and against evidence, arbitrarily increased the value of its property, and the return denies the allegation of the petition, and the journal of the board shows that evidence was heard by the board as to the value of the property, but not what the evidence was, there is nothing to review.—Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294.

**Sup. 1878.** In a proceeding by certiorari the only question is, is there error in the record of the inferior tribunal brought up on

the writ? State ex rel. Halpin v. Powers, 68 Mo. 320.

**Sup. 1898.** In certiorari, allegations not denied by the return must be taken as true.—State ex rel. Armour Packing Co. v. Stephens, 48 S.W. 929, 146 Mo. 602, 69 Am. St. Rep. 625.

**Sup. 1900.** Where the record on certiorari to review proceedings for the organization of a drainage district under Rev. St. 1899, §§ 8278–8317c (Ann. St. 1906, pp. 3916–3935), as amended, does not show that any private property was taken or damaged for public use before just compensation was paid therefor, the question of the invalidity of the statute as authorizing the taking and damaging of private property without just compensation having been first ascertained and paid will not be considered.—State ex rel. Appelgate v. Taylor, 123 S.W. 892, 224 Mo. 393.

Where the record on certiorari to review proceedings under Rev. St. 1899, §§ 8278–8317c (Ann. St. 1906, pp. 3916–3935), for the drainage of overflowed lands, does not show that any one was damaged in a particular manner, the question whether the statute provided for compensation for such damage would not be considered.—Id.

**Sup. 1916.** On certiorari to review the judgment of the Court of Appeals in remanding a cause after reversal, the finding of the appellate court that evidence was sufficient to warrant a submission to the jury of separate counts alleging defendant's liability under the humanitarian doctrine, will not be reversed where the record does not contain all the evidence.—State ex rel. Scullin v. Robertson, 187 S.W. 34.

**Sup. 1926.** Supreme Court can find no error in instruction which Court of Appeals stated was too long to set out in full.—State ex rel. Fulton Iron Works v. Allen, 289 S.W. 583, quashing certiorari (App. 1924) Ferguson v. Fulton Iron Works, 259 S.W. 811.

**Sup. 1927.** Instructions not referred to in opinion, nor questions thereon raised in brief or assigned and considered by Court of Appeals, cannot be reviewed.—State ex rel. Locke v. Trimble, 298 S.W. 782.

**App. 1890.** The object of a writ of certiorari being only to bring up a record of an inferior court, only such errors or defects as appear on the face of the record can be considered.—State ex rel. Harrah v. Cauthorn, 40 Mo. App. 94.

⚡58. — **Matters not apparent of record.**

In certiorari proceedings, the determination of the question involved is to be made on the return, and facts cannot be brought to the attention of the court outside of the return.

—**Sup.** 1878. *House v. Clinton County Court*, 67 Mo. 522;

**App.** 1897. *State ex rel. School Dist. v. Williams*, 70 Mo. App. 238.

On certiorari there can be reviewed only such matters as appear from the face of the record brought up by the writ, and which go to the jurisdiction of the tribunal to which the writ is sued out.

—**Sup.** 1896. *Ward v. Board of Equalization of Gentry County*, 36 S.W. 648, 135 Mo. 309; *Blocklock v. Board of Equalization of Gentry County*, 36 S.W. 1132;

**App.** 1912. *State ex rel. Gloyd v. Gilbert*, 148 S.W. 125, 164 Mo. App. 139.

**Sup.** 1908. A writ of certiorari brings up the record proper, and, there being no statutory provision making evidence taken in proceedings before the mayor upon trial of city officers a part of the record, the evidence in such proceedings will not be considered on certiorari.—*State ex rel. Helmburger v. Wells*, 109 S.W. 758, 210 Mo. 601.

**Sup.** 1922. On certiorari to quash the record of the Court of Appeals, where the opinion of the Court of Appeals referred to the answer in the case, the Supreme Court can examine the record to ascertain the contents of the answer.—*State ex rel. National Council of Knights and Ladies of Security v. Trimble*, 239 S.W. 467.

**Sup.** 1928. Common-law writ of certiorari only brings up record, and can only reach defects or errors on face of record and going to jurisdiction.—*State ex rel. Horton v. Clark*, 9 S.W.(2d) 635.

**App.** 1894. The jurisdiction of inferior tribunals, when attacked by a writ of certiorari, must appear by some part of the record of their proceedings.—*State ex rel. Robinson v. City of Neosho*, 57 Mo. App. 192.

**App.** 1897. In certiorari proceedings, the court applied to is not authorized to go to the relator's application or petition for the record to be reviewed; the petition in such cases being in no sense a pleading under the statute, as in ordinary cases, where, if the allegations are not denied, they are to be taken as true.—*State ex rel. School Dist. v. Williams*, 70 Mo. App. 238.

**App.** 1905. Certiorari brings up for review only the record of the tribunal to which it is directed, and not the evidence, nor can the evidence be considered, even though included in the return.—*School Dist. No. 2, Tp. 24, R. 6 E., Butler County, v. Pace*, 87 S.W. 580, 113 Mo. App. 134.

**App.** 1909. There being no provision for preserving the evidence taken before the county court and making the same a part of the record, such evidence cannot be reviewed on certiorari.—*State ex rel. Kelley v. Wooten*, 122 S.W. 1103, 139 Mo. App. 231.

**App.** 1918. Proceedings in certiorari bring up the record only, and matters not appearing therein cannot be considered.—*State ex rel. Pollard v. Brasher*, 201 S.W. 1150, 200 Mo. App. 117.

**App.** 1926. In certiorari, appellate court considers only record sent up, and writ is properly quashed if record discloses compliance with statute in relation to stock law election alleged to be irregularly extended (*Rev. St.* 1919, § 4283).—*State ex rel. Brince v. Franklin*, 283 S.W. 712, 220 Mo. App. 232.

⚡59. **Assignment of errors.**

**Sup.** 1878. In a proceeding by certiorari in the Supreme Court, the petition for the writ may be regarded as in the nature of an assignment of errors on the record sought to be reviewed, in the absence of any more formal assignment of errors after the record is returned to the court. Further than this the petition is not to be viewed as a pleading in the cause, and the record is to be examined by the court just as if brought up by writ of error or on appeal.—*State ex rel. Halpin v. Powers*, 68 Mo. 320.

⚡60. **Quashing or dismissal.**

**Sup.** 1902. A motion to dismiss a writ of certiorari, being in the nature of a demurrer, may be made and granted before return has been made to the writ.—*State ex rel. Underwood v. Fraker*, 68 S.W. 576, 168 Mo. 445.

**Sup.** 1916. On certiorari to review judgment of the Court of Appeals on the ground that its decision, refusing to determine whether verdict on one count is a bar to actions on other counts covering the same cause of action, is in conflict with designated decisions of the Supreme Court, the writ should be quashed where no such conflict in fact is shown.—*State ex rel. Scullin v. Robertson*, 187 S.W. 34.

**Sup. 1920.** Where relator, in an original proceeding by certiorari to quash the record in a case decided by a Court of Appeals on the ground the decision conflicted with a controlling decision of the Supreme Court, failed to comply with Rule 33 of the Supreme Court (186 S.W. x), by filing copies of printed abstract previously served on respondent judges at least 30 days before the day set for hearing, the case will be dismissed.—*State ex rel. Kansas City v. Ellison*, 219 S.W. 90, 280 Mo. 595.

**Sup. 1921.** A preliminary writ of certiorari issued by the circuit court may be quashed on motion for return.—*State ex rel. Gardner v. Harris*, 227 S.W. 818, 286 Mo. 262.

**Sup. 1925.** Writ will be dismissed, where relator fails to file abstract in accordance with rules of Supreme Court.—*State ex rel. Hirsch v. Allen*, 274 S.W. 353, dismissing certiorari (App. 1924) *State v. Hirsch*, 260 S. W. 557.

**App. 1928.** Motion to quash certiorari for want of jurisdiction and right to relief prayed on face of petition was in effect a demurrer confessing all facts well pleaded.—*Village of Grandview v. McElroy*, 9 S.W.(2d) 829.

#### 61. Notice of hearing.

*See explanation, page iii.*

#### 62. Hearing and rehearing.

*See explanation, page iii.*

#### 63. Review.

#### 64. — Scope and extent in general.

##### 64 (1). In general.

Certiorari only brings up the record of the inferior court, and its office is to reach only such defects or errors in the proceedings as appear on the face of the record.

—**Sup. 1876.** *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294;

**App. 1890.** *State ex rel. Harrah v. Canthorn*, 40 Mo. App. 94; (1891) *State ex rel. Reider v. Moniteau County Court*, 45 Mo. App. 387; (1895) *State ex rel. Brennan v. Walbridge*, 62 Mo. App. 162.

**Sup. 1875.** Since the effect of the writ of certiorari is merely to bring up the records and proceedings of the lower court, where a petition for that writ charged facts dehors the record, showing the illegality of a certain county tax, on a hearing of the cause those material to the case should be proved or admitted as in other trials; otherwise, the writ

should be dismissed.—*Rogers v. Clinton County Court*, 60 Mo. 101.

**Sup. 1903.** Under the Constitution, certiorari is one of the methods by which the Supreme Court exercises its superintending control over the courts of appeals. It only brings up the record, and the Supreme Court will only consider errors and defects which appear upon the face of the record and which are jurisdictional in their nature.—*State ex rel. Scott v. Smith*, 75 S.W. 586, 176 Mo. 90.

**Sup. 1909.** The Supreme Court, in a cause brought to it on a writ of certiorari, cannot quash the record of the Court of Appeals in a cause of which it had jurisdiction, on the ground that there is error in the judgment.—*State ex rel. Brown v. Broadus*, 115 S.W. 1018, 216 Mo. 336.

**Sup. 1914.** The writ of certiorari brings up for review only the record proper.—*State ex rel. Summerson v. Goodrich*, 165 S.W. 707, 257 Mo. 40.

**Sup. 1914.** The Supreme Court, on certiorari to quash a judgment of the Court of Appeals on the ground that it failed to follow the last previous decision of the Supreme Court, will consider only the pleadings, evidence, and facts as recited by the Court of Appeals.—*State ex rel. United Rys. Co. v. Reynolds*, 165 S.W. 729, 257 Mo. 19, quashing certiorari (1913) *Nelson v. United Rys. Co. of St. Louis*, 158 S.W. 446, 17 Mo. App. 423.

**Sup. 1915.** Under rule that Supreme Court on certiorari to quash judgment of Court of Appeals as conflicting with its own ruling would consider only the pleadings, evidence, and facts, *held* that, where decision of Court of Appeals recognized ruling of Supreme Court, but distinguished it on facts, certiorari would be quashed.—*State ex rel. Chicago, R. I. & P. Ry. Co. v. Ellison*, 173 S. W. 690, 263 Mo. 509.

**Sup. 1915.** A question as to right of the Supreme Court to issue a writ of certiorari raised in the return to a writ, but omitted in the brief of counsel for respondent, will be treated as abandoned.—*State ex rel. City of Kirkwood v. Reynolds*, 175 S.W. 575, 265 Mo. 88.

**Sup. 1915.** On certiorari to review a judgment of the Court of Appeals, it is not the province of the Supreme Court to determine how the Court of Appeals should decide the cause, nor whether the bill of exceptions filed by appellant is available to respondent, but only to say whether the deci-

sion was in conflict with decisions of the Supreme Court.—*State ex rel. Southwest Nat. Bank of Kansas City v. Ellison*, 181 S.W. 998, 266 Mo. 423.

**Sup. 1916.** In certiorari proceedings to review record of Court of Appeals on appeal from order overruling motion to quash execution, *held*, that it was Supreme Court's duty to examine assailed portions of opinion of Court of Appeals, though conclusion reached by another part of opinion logically justified judgment.—*State ex rel. Hayes v. Ellison*, 191 S.W. 49.

Inadvertence of Court of Appeals in stating there was personal service *held* not to be made basis of quashing any part of its record on certiorari.—*Id.*

**Sup. 1917.** On certiorari for alleged conflict between Court of Appeals and this court, opinions of appellate court are not for consideration, but only whether its decision contravenes rulings of Supreme Court.—*State ex rel. Quereus Lumber Co. v. Robertson*, 197 S.W. 79, quashing certiorari (App. 1916) *Allen v. Quereus Lumber Co.*, 190 S.W. 86.

On certiorari it is for relator to point out conflicts and not for this court to search for them.—*Id.*

On certiorari contention that ruling of Court of Appeals on question of assumption of risk is adverse to cases of this court will not be considered where no instructions were asked or given on such question, and matter was not discussed by Court of Appeals.—*Id.*

**Sup. 1918.** In determining, on certiorari whether a decision of the Court of Appeals conflicted with controlling decisions of the Supreme Court, an alleged fact not mentioned in the opinion of the Court of Appeals could not be taken into consideration.—*State ex rel. St. Regis Realty & Investment Co. v. Reynolds*, 200 S.W. 1039.

**Sup.** The extent of inquiry on certiorari to quash decision of Court of Appeals, as in conflict with decisions of Supreme Court, is limited to contents of the opinion and decision.—(1918) *State ex rel. Shawhan v. Ellison*, 200 S.W. 1042, 273 Mo. 218, quashing certiorari (1916) *Shawhan v. Shawhan Distillery Co.*, 197 S.W. 369, 195 Mo. App. 445; (1919) *State ex rel. Metropolitan St. Ry. Co. v. Ellison*, 208 S.W. 443; *State ex rel. McNulty v. Ellison*, 210 S.W. 881, 278 Mo. 42.

**Sup. 1918.** In certiorari to review decision of Court of Appeals on ground that it

conflicts with decisions of Supreme Court, it is immaterial what the Supreme Court thinks of the question as an original proposition, and the judgment can be quashed only when there is a conflict.—*State ex rel. Wabash Ry. Co. v. Ellison*, 204 S.W. 396, quashing certiorari (App.) *McGolderick v. Wabash Ry. Co.*, 200 S.W. 74, 200 Mo. App. 436.

Decision of Court of Appeals that, as railroad is required by statute to cut weeds along right of way, a person employed to do the work, who left grindstone near road, which frightened plaintiff's horse, which ran away, injuring plaintiff, was not an independent contractor, because such relationship could not exist as to a statutory duty, is not in conflict with any prior decision of the Supreme Court.—*Id.*

**Sup. 1919.** On certiorari to review the opinion of the Court of Appeals on ground that it conflicts with previous decisions of the Supreme Court, the Supreme Court will not accept the facts stated in motion for rehearing as true, inasmuch as the truth of such facts can only be proven by the record, which the court will not examine.—*State ex rel. McNulty v. Ellison*, 210 S.W. 881, 278 Mo. 42.

**Sup. 1919.** On certiorari to review record of the Court of Appeals, the Supreme Court will not go to bill of exceptions as printed in abstract for the evidentiary facts, but for facts as disclosed by the evidence in the case will go only to opinion of Court of Appeals, and will not review case as one upon appeal or examine testimony to determine de novo whether there was evidence to take case to jury.—*State ex rel. Dunham v. Ellison*, 213 S.W. 459, 278 Mo. 649, reversing judgment (App. 1918) *Griggs v. Dunham*, 204 S.W. 573.

**Sup. 1919.** Except as to the question of jurisdiction, which the Supreme Court must determine before considering on its merits petition for certiorari to the Court of Appeals, as involving conflicting decisions, the Supreme Court, under Const. Amend. 1884, § 6, is limited in review to the determination of whether the opinion of the Court of Appeals is in harmony with previous rulings of the Supreme Court.—*State ex rel. Commonwealth Trust Co. v. Reynolds*, 213 S.W. 804, 278 Mo. 695.

**Sup. 1919.** In reviewing action of board of equalization on certiorari, court cannot go beyond the face of the record.—*State ex rel. McCune v. Carter*, 214 S.W. 180, 279 Mo. 304.

**Sup. 1919.** On certiorari to review opinion of Court of Appeals, claimed to be in conflict with decisions of Supreme Court, ruling of Court of Appeals must stand, in so far as certiorari proceedings are concerned, where no conflict is shown.—*State ex rel. Pelligreen Const. Co. v. Reynolds*, 214 S.W. 369, 279 Mo. 493.

**Sup. 1919.** On certiorari directed to the judges of one of the Courts of Appeals for examination with reference to the jurisdiction of such court, in that its judgment is in conflict with and fails to follow the last and controlling decisions of the Supreme Court, the Supreme Court cannot determine whether the judgment was right or wrong, but can only decide whether or not the judgment contravenes a previous decision of the Supreme Court upon the same point. (Per Goode, J.)—*State ex rel. Smith v. Reynolds*, 216 S.W. 773, quashing certiorari (App.) *German-American Bank v. Smith*, 208 S.W. 878.

Decision of Court of Appeals relating to the interpretation of Rev. St. 1909, §§ 9999, 10022, 10024-10026, in regard to the burden of proof in an action on a note, where it is questioned whether the plaintiff is a holder in due course, *held* not in conflict with another decision on that subject, so as to confer jurisdiction on the Supreme Court.—*Id.*

**Sup. 1919.** On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, it is not within the scope of the Supreme Court's duty or prerogative to decide whether the holding of the Court of Appeals was right or wrong; such court having jurisdiction to decide wrong as well as right.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S.W. 967.

**Sup.** In an original proceeding in certiorari to quash a decision of the Court of Appeals, the Supreme Court is limited to review of matters of conflict, and cannot determine the merits.—(1920) *State ex rel. Metropolitan St. R. Co. v. Ellison*, 224 S.W. 820, quashing certiorari (App. 1919) *Quirk v. Metropolitan St. Ry. Co.*, 210 S.W. 106; *State ex rel. Abbott v. Bradley*, 223 S.W. 98; *State ex rel. Boatmen's Bank v. Reynolds*, 218 S.W. 337, 281 Mo. 1, quashing record (App. 1919) *Boatmen's Bank v. Semple Place Realty Co.*, 213 S.W. 900, 202 Mo. App. 57; (1922) *State ex rel. Missouri State Life Ins. Co. v. Allen*, 243 S.W. 839, 295 Mo. 307; (1926) *State ex rel. Utz v. Daues*, 287 S.W. 606, quashing certiorari to set aside judgment and opinion (App.) *Utz v. Mayes*, 267 S.W. 59.

**Sup.** For the purpose of discovering conflict between an opinion of the Court of Appeals and a controlling decision of the Supreme Court, the facts stated by the Court of Appeals in its opinion will be treated by the Supreme Court as true.—(1920) *State ex rel. City of Webster Groves v. Reynolds*, 223 S.W. 12, quashing certiorari (App. 1919) *City of Webster Groves to Use of McMahon v. Reber*, 212 S.W. 38; (1921) *State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds*, 233 S.W. 219, 289 Mo. 479, quashing judgment and opinion (App.) *Martin v. St. Louis-San Francisco Ry. Co.*, 227 S.W. 129; (1923) *State ex rel. Presnell v. Cox*, 250 S.W. 374.

**Sup. 1920.** The Supreme Court, on certiorari to quash record of the Court of Appeals on the ground that its ruling contravenes certain decisions of the Supreme Court, is limited in its review to the opinion of the Court of Appeals; and, if such opinion does not disclose a conflict with the former rulings of Supreme Court, its power of superintendence is at an end.—*State ex rel. Bush v. Sturgis*, 221 S.W. 91, 281 Mo. 598, 9 A. L. R. 1315.

**Sup. 1920.** On certiorari to quash the opinion of the Court of Appeals as conflicting with a controlling decision of the Supreme Court, an instruction, not set out, discussed, or referred to in the opinion of the Court of Appeals, cannot be considered.—*State ex rel. City of St. Joseph v. Ellison*, 223 S.W. 671, quashing certiorari (App. 1919) *Bradford v. City of St. Joseph*, 214 S.W. 281.

**Sup. 1920.** On certiorari to quash a decision of Court of Appeals on the ground of conflict with decisions of the Supreme Court, the conflict of the opinion must appear before the record can be quashed.—*State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds*, 226 S.W. 564, 286 Mo. 204, modifying opinion *Schulz v. St. Louis, I. M. & S. Ry. Co.*, 223 S.W. 757.

On certiorari to quash an opinion of Court of Appeals on the ground that it was in conflict with decisions of the Supreme Court, only facts incorporated in the opinion, directly or by reference, can be considered.—*Id.*

On certiorari to quash a decision of the Court of Appeals on the ground of conflict with the decision of the Supreme Court, a statement as to the testimony of a witness, where the reader was not referred to the record of the testimony for facts other than those stated, the witness' entire testimony cannot be considered; the Supreme Court be-

ing bound by the usual rule that it will not go beyond the opinion.—Id.

On certiorari to quash a decision of the Court of Appeals, party who did not apply for the writ, but who was required by such opinion to consent to a remittitur as condition to affirmance, may suggest that such provision conflicts with the decisions of the Supreme Court.—Id.

**Sup. 1920.** On certiorari to the Court of Appeals, no question concerning the correctness of a controlling decision of the Supreme Court which the Court of Appeals has followed can be reviewed.—State ex rel. St. Louis Brewing Ass'n v. Reynolds, 226 S.W. 579, quashing certiorari (App.) Lampe v. St. Louis Brewing Ass'n, 221 S.W. 447, 204 Mo. App. 373.

**Sup. 1921.** Under the Supreme Court's limited power of supervision by certiorari it is necessary to determine whether the ruling of the Court of Appeals runs counter to the Supreme Court's decisions on a general principle of law announced or announces a ruling contrary to that of the Supreme Court under a like state of facts.—State ex rel. Brotherhood of American Yeoman v. Reynolds, 229 S.W. 1057, 287 Mo. 169, reversing judgment (App. 1920) Wilson v. Brotherhood of American Yeoman, 223 S.W. 992.

**Sup. 1921.** On certiorari to quash record on the ground that the opinion of the Court of Appeals is in conflict with the decisions of the Supreme Court, the Supreme Court cannot consider evidence not appearing in the opinion.—State ex rel. Dick & Bros. Quincy Brewery Co. v. Ellison, 229 S.W. 1059, 287 Mo. 139, quashing record (App. 1920) Vaughn v. William F. Davis & Sons, 221 S.W. 782.

**Sup. 1921.** On certiorari to quash the record of the Court of Appeals reversing judgment for relators suing on certain sewer tax bills, the main controversy being the difference between the terms of the ordinance authorizing the work and those of the contract and bond for its faithful performance, such difference is to be determined from the opinion of the Court of Appeals, and correlative facts on which the Court of Appeals based its ruling can be referred to only as aids in more clearly understanding the court's decision.—Ford v. Ellison, 230 S.W. 637, 287 Mo. 683.

**Sup. 1921.** Upon certiorari to the Court of Appeals, the Supreme Court is not to determine whether the view of the Court of Ap-

peals is correct or incorrect, but only whether it conflicts with the controlling decision of the Supreme Court.—State ex rel. American Packing Co. v. Reynolds, 230 S.W. 642, 287 Mo. 607, quashing certiorari (App. 1920) Hecksfuss v. American Packing Co., 224 S.W. 99.

Upon certiorari to the Court of Appeals, the Supreme Court is not concerned with any conflict which may exist between opinions of any of the Courts of Appeals, but is only to determine whether the opinion in the case under review conflicts with controlling decision of the Supreme Court.—Id.

**Sup. 1921.** The Supreme Court on certiorari will disregard any alleged conflict with opinions of the several Courts of Appeals.—State ex rel. Mann v. Trimble, 232 S.W. 100.

**Sup. 1921.** On certiorari to the Court of Appeals to quash its record for conflict with controlling opinions of the Supreme Court, only such portion of the evidence can be considered as appears from the opinion of the Court of Appeals.—State ex rel. American Central Ins. Co. v. Reynolds, 232 S.W. 683, 289 Mo. 382, quashing certiorari to Court of Appeals (1920) Hayden v. American Cent. Ins. Co., 221 S.W. 437.

**Sup.** In certiorari, the Supreme Court will not extend its inquiry beyond the opinion of the inferior court and any pleading, instruction, or written instrument referred to therein.—(1921) State ex rel. Continental Ins. Co. v. Reynolds, 235 S.W. 88, quashing certiorari (App. 1920) American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 208 Mo. App. 87; (1922) State ex rel. Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari (App. 1921) Raleigh Inv. Co. v. Cureton, 232 S.W. 766.

**Sup. 1921.** In certiorari, the province of the Supreme Court is to consider whether, on the facts found in the opinion of the inferior court, it announced some conclusion of law contrary to the last previous ruling of the Supreme Court upon the same, or a similar, state of facts.—State ex rel. Continental Ins. Co. v. Reynolds, 235 S.W. 88, quashing certiorari (App. 1920) American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 208 Mo. App. 87.

**Sup. 1921.** On certiorari it is not the province of the Supreme Court to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but only whether upon those

facts it announced some conclusion of law contrary to the last previous ruling of Supreme Court on the same or a similar state of facts.—*State ex rel. Calhoun v. Reynolds*, 233 S.W. 483, 289 Mo. 506, quashing certiorari (App. 1920) *State ex rel. Priest v. Calhoun*, 226 S.W. 329, 207 Mo. App. 149.

**Error of Court of Appeals in a prohibition proceeding**, in holding that a petition in the trial court did not show jurisdictional facts sufficient to warrant the appointment of a receiver by the trial court, was error as a matter of opinion, and the Supreme Court on certiorari has no authority to quash its judgment.—*Id.*

**Misapplication by Court of Appeals of rules announced in Supreme Court decisions** does not constitute error cognizable on certiorari in the Supreme Court, where the facts are in no way analogous to the facts in Supreme Court cases.—*Id.*

**Sup. 1922.** An alleged error not assigned or considered by the Court of Appeals cannot be reviewed by the Supreme Court on certiorari.—*State ex rel. United Rys. Co. of St. Louis v. Allen*, 240 S.W. 117.

**Sup. 1922.** The Supreme Court, on certiorari to review a decision of the Court of Appeals on the ground of nonconformity with a decision of the Supreme Court, does not review alleged error by the Court of Appeals in applying the rules of law to the facts stated on the opinion, but only to whether upon the facts stated the appellate court announced a conclusion of law in conflict with the latest pronouncement of the Supreme Court.—*State ex rel. Raleigh Inv. Co. v. Allen*, 242 S.W. 77, 294 Mo. 214, quashing certiorari (App. 1921) *Raleigh Inv. Co. v. Cureton*, 232 S.W. 766.

**Sup. 1922.** On certiorari to quash record of Court of Appeals for conflict with decisions of the Supreme Court, the Supreme Court cannot review the facts, except so far as stated in opinion of Court of Appeals, and cannot dig out of the record facts not stated in order to overturn the opinion.—*State ex rel. Missouri State Life Ins. Co. v. Allen*, 243 S.W. 830, 295 Mo. 307.

**Sup. 1922.** On certiorari to quash judgment of Court of Appeals, reference in the opinion of such court to a contract makes such contract as much a part of the opinion as if fully written out therein for the purpose of review.—*State ex rel. Studebaker Corporation of America v. Trimble*, 247 S.W. 119, 295 Mo. 667.

**Sup. 1923.** On certiorari to the Supreme Court to review a judgment of the Court of Appeals, it is not the province of the Supreme Court to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but whether, taking the facts as found by the Court of Appeals its conclusions of law are in harmony or contrary to the latest rulings of the Supreme Court.—*State ex rel. Shaw Transfer Co. v. Trimble*, 250 S.W. 384, quashing certiorari (App. 1922) *Burke v. Shaw Transfer Co.*, 243 S.W. 449.

**Sup. 1923.** On certiorari to quash a decision of a Court of Appeals, on the ground of conflict with rulings of the Supreme Court, the Supreme Court will not determine whether the rulings of the Court of Appeals were correct, but only whether they were in conflict with rulings previously made by the Supreme Court.—*State ex rel. Shaw Transfer Co. v. Trimble*, 250 S.W. 396, quashing certiorari (1922) *Jepson v. Shaw Transfer Co.*, 243 S.W. 370, 211 Mo. App. 366.

**Sup. 1923.** In reviewing by certiorari the opinion of the Court of Appeals, the Supreme Court may only inspect the evidentiary facts found therein to ascertain if the ruling of the Court of Appeals conflicts with the latest ruling of the Supreme Court on the subject.—*State ex rel. Missouri Public Utilities Co. v. Cox*, 250 S.W. 551, 298 Mo. 427, quashing judgment (App. 1922) *Book v. Missouri Public Utilities Co.*, 242 S.W. 433.

**Sup. 1923.** On certiorari to the Court of Appeals the Supreme Court will not go into the bill of exceptions for the evidentiary facts, but will go only to the Court of Appeals opinion.—*State ex rel. Dowell v. Allen*, 250 S.W. 580, quashing certiorari (App. 1922) *Ford v. Dowell*, 243 S.W. 366.

**Sup. 1923.** On certiorari to review a judgment of a Court of Appeals, the fact that relators filed what they called a separate abstract of the record, which was the abstract of record used in the Court of Appeals, and which was the same as the abstract made a part of return of the Court of Appeals as required, could not prejudice respondents and cannot be complained of by them.—*State ex rel. Seibel v. Trimble*, 253 S.W. 215, 299 Mo. 164, quashing certiorari (App.) *Price v. Seibel*, 253 S.W. 212.

On certiorari to review the judgment of any appellate court, alleged error of the Court of Appeals not in conflict with decisions of

the Supreme Court will not be considered.—Id.

**Sup. 1923.** Whether judges of the Court of Appeals correctly concluded that the same question decided by them in a previous case was presented cannot be considered on certiorari to quash their judgment as in conflict with a controlling decision of the Supreme Court, where the correctness of such conclusion is not challenged as contravening any such decision.—State ex rel. Schwepker v. Daues, 253 S.W. 968.

**Sup. 1923.** Under the rule that, on certiorari to review a decision of the Court of Appeals because it conflicts with Supreme Court decision, that court looks only to harmony of the written opinions, and not decisions on the facts, questions as to whether the abstract of the record is complete or whether evidence not considered in the opinion was properly or improperly admitted, ruling of the Court of Appeals on the former appeal, and whether the facts on the first appeal are the same as on the second are not reviewable.—State ex rel. Olsen v. Allen, 253 S.W. 1012. Quashing certiorari (App. 1922) Olsen v. Supreme Council of Royal Arcanum, 237 S.W. 889.

**Sup. 1923.** When the Supreme Court once acquires jurisdiction of a case by reason of alleged conflict in opinions, it will consider all conflicts, whether suggested or not, but within the personal knowledge of the court; the purpose of certiorari to review such a case being to secure uniformity in opinions and harmony in the law.—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing opinion (App.) Vulgamott v. Payne, 245 S.W. 592.

**Sup. 1923.** On certiorari to quash judgment of Court of Appeals on the ground of its holdings in favor of insured being in conflict with rulings of the Supreme Court, there is no basis for consideration of the contention that the rate of premium charged conclusively shows that the keeping or use of explosives on the premises was not contemplated, no question with reference to such rate as bearing on the construction to be placed on the policy having been presented to or considered by the Court of Appeals.—State ex rel. Agricultural Ins. Co. of Watertown, N. Y., v. Allen, 254 S.W. 194.

**Sup. 1923.** Unless the Supreme Court can say from facts stated by the Court of Appeals in its opinion it is in conflict with the last previous ruling of the Supreme Court

on the same or similar facts, no legal right is shown to quash the record.—State ex rel. American Press v. Allen, 256 S.W. 1040, quashing certiorari (App.) Stubbs v. American Press, 254 S.W. 105.

**Sup. 1924.** Correctness of Court of Appeals' disposition of case not before court on certiorari whereby it is sought to have same quashed for conflict with opinion of Supreme Court.—State ex rel. Continental Life Ins. Co. of Kansas City v. Allen, 262 S.W. 43, 303 Mo. 608, modifying opinion (App. 1923) Brabham v. Pioneer Life Ins. Co. of America, 253 S.W. 786.

Supreme Court on certiorari cannot quash opinion of the Court of Appeals for failure to discuss a question which might have been appropriately discussed and decided, but was not.—Id.

**Sup. 1924.** Supreme Court never having construed provisions in life insurance policy sued on with reference to question whether it was 30-year life or term policy, it is immaterial, on certiorari to quash Court of Appeals opinion, whether latter is correct.—State ex rel. Security Mut. Life Ins. Co. v. Allen, 267 S.W. 379, 305 Mo. 607, quashing certiorari (1923) Howell v. Security Mut. Life Ins. Co., 253 S.W. 411, 215 Mo. App. 692.

**Sup. 1924.** On certiorari to quash record of Court of Appeals, on ground that its ruling conflicts with decisions of Supreme Court, question is whether opinion of Court of Appeals is in conflict with conclusion of Supreme Court in its last and controlling decision upon the same or similar state of facts.—State ex rel. John Hancock Mut. Life Ins. Co. of Boston v. Allen, 267 S.W. 832, 306 Mo. 197, quashing writ of certiorari (App. 1923) Cradick v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 256 S. W. 501.

The Supreme Court, in certiorari to quash record of Court of Appeals on ground of conflict with decisions of Supreme Court, will go only to opinion of such court for facts and evidence, and will not examine evidence to determine de novo whether it is sufficient to support judgment, nor will it go into testimony of witnesses to determine their accuracy or conclusive character.—Id.

**Sup. 1925.** Supreme Court on certiorari to quash opinion of Court of Appeals will consider only part of record relating to conflict.—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536.



Conflict of Court of Appeals decision with Supreme Court decisions noticed, though not suggested by relator.—Id.

**Sup. 1925.** Supreme Court on writ to Court of Appeals cannot examine record, but limited to opinion.—State ex rel. Greer v. Cox, 274 S.W. 373, quashing certiorari (1924) Smith v. Greer, 257 S.W. 829, 216 Mo. App. 155.

Whether Court of Appeals properly construed facts or whether evidence susceptible of construction claimed by relator not inquired into on certiorari from Supreme Court.—Id.

**Sup. 1925.** Conflict between decisions of Court of Appeals and those of Supreme Court must appear on face of opinion.—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597.

Objections not considered by Court of Appeals nor raised in court below not considered by Supreme Court in reviewing Court of Appeals' decision on certiorari.—Id.

Evidence shown by record not considered.—Id.

**Sup. 1925.** Supreme Court required to cast aside all irrelevant matter in petition, where full record of probate court touching matter was before it.—State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

**Sup. 1925.** Court of Appeals considers question, whether discussed or not, where it is necessarily and unavoidably involved in decision reached.—State ex rel. Boeving v. Cox, 276 S.W. 869, 310 Mo. 367, quashing opinion (1924) Petty v. Boeving, 264 S.W. 66, 216 Mo. App. 271.

**Sup. 1925.** Points not covered in opinion of court not considered on certiorari to quash.—State ex rel. Major v. Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386, quashing certiorari (App. 1924) Major v. Hast, 263 S.W. 466.

**Sup. 1925.** Questions not discussed nor ruled on by Court of Appeals not considered by Supreme Court on certiorari.—State ex rel. Burton v. Allen, 278 S.W. 772, 312 Mo. 111, opinion conformed to (App. 1926) Burton v. Newark Fire Ins. Co., 284 S.W. 865, and quashing opinion in part (App. 1924) 263 S.W. 539.

**Sup. 1926.** Case decided by one Court of Appeals not considered on certiorari proceeding against another Court of Appeals.—

State ex rel. Cox v. Trimble, 279 S.W. 60, 312 Mo. 322.

Necessary conditions for quashing opinion of Court of Appeals on certiorari stated.—Id.

**Sup. 1926.** Inquiry on certiorari to quash opinion of Court of Appeals must be confined to limits of original proceeding, and not extended over field afforded by appeal.—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion (App. 1924) Mueller v. John Hancock Mut. Life Ins. Co., 261 S.W. 709.

Supreme Court on certiorari to quash Court of Appeals' opinion looks for facts to opinion of Court of Appeals and pleading, instruction, or written instrument referred to therein, and cannot review evidence in abstract as on appeal.—Id.

That cases with which Court of Appeals' opinion conflicts were not cited in briefs filed on certiorari to quash opinion is not material.—Id.

Supreme Court, in determining question of alleged conflict, is not confined to suggestions of conflict made by relator, but may quash record if conflicting with any ruling of which Supreme Court has knowledge.—Id.

Instruction not referred to in Court of Appeals' opinion cannot be considered in Supreme Court on certiorari to quash Court of Appeals' opinion.—Id.

**Sup. 1926.** Supreme Court, on certiorari to quash record of Court of Appeals, is limited to determining whether opinion is contrary to Supreme Court decision, and will not determine if statutes have been misinterpreted or whether there were other errors in construction of law (Const. art. 6, § 6).—State ex rel. Tummons v. Cox, 282 S.W. 694, 313 Mo. 672, quashing writ of certiorari (App. 1925) Tummons v. Stokes, 274 S.W. 528.

**Sup. 1926.** In certiorari proceeding to quash record of Court of Appeals for conflict, Supreme Court will dispose of case only on that theory.—State ex rel. Travelers' Indemnity Co. v. Daues, 285 S.W. 479, 315 Mo. 22, quashing writ of certiorari (App. 1925) Kistenmacher v. Travelers' Indemnity Co., 273 S.W. 125.

**Sup. 1926.** Where Court of Appeals did not decide validity of statute, Supreme Court will not consider it on certiorari to quash

opinion.—*State ex rel. Utz v. Daues*, 287 S. W. 806. Quashing certiorari to set aside judgment and opinion (App. 1925) *Utz v. Mayes*, 267 S.W. 59.

**Sup. 1928.** Supreme Court's power is limited to determining whether Court of Appeals has applied same rules to facts as Supreme Court has applied to similar facts.—*State ex rel. Koenen v. Daues*, 288 S.W. 14, quashing writ of certiorari (App.) *Koenen v. Terminal Railroad Ass'n*, 280 S.W. 73.

**Sup. 1926.** Procedural errors on certiorari cannot be in case before Supreme Court.—*State ex rel. Meyer v. Schlotzhauer*, 286 S. W. 82, 315 Mo. 347.

**Sup. 1926.** On certiorari, Court of Appeals' judgments are conclusive, unless conflicting with prior controlling Supreme Court decision on similar facts.—*State ex rel. Winters v. Trimble*, 290 S.W. 115, 315 Mo. 1295, quashing certiorari (App.) *Winters v. Reserve Loan Life Ins. Co.*, 290 S.W. 109; *State ex rel. Bradley v. Trimble*, 289 S.W. 922, 316 Mo. 97, quashing certiorari *Smith v. Nicholson*, 289 S.W. 349, 221 Mo. App. 428.

**Sup. 1926.** On certiorari for conflict of decisions, Supreme Court will pass only on rulings actually made.—*State ex rel. Metropolitan Life Ins. Co. v. Daues*, 297 S.W. 951, quashing certiorari (App. 1925) *Hickey v. Metropolitan Life Ins. Co.*, 270 S.W. 388.

**Sup. 1927.** Supreme Court is not limited to cases cited by relator in petition for certiorari as contravened by Court of Appeals' ruling (Rule 34). (Per Walker, C. J., and Graves, J.)—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record (1926) *Allen v. Best*, 279 S.W. 728, 220 Mo. App. 1041.

**Sup. 1927.** Supreme Court on certiorari to Court of Appeals may determine only whether judgment conflicts with last previous ruling of Supreme Court.—*State ex rel. Security Ins. Co. v. Trimble*, 300 S.W. 812, 318 Mo. 173.

Supreme Court on certiorari to Courts of Appeals is not limited to determining whether subject-matter conflicts with cited case (Const. Amend. 1884, § 6).—*Id.*

**Sup. 1927.** Supreme Court on certiorari for conflict of decisions must take notice of conflict in matters not specifically assigned as conflicting.—*State ex rel. Gordon v. Trimble*, 300 S.W. 475, 318 Mo. 341.

**Sup. 1928.** Supreme Court, on certiorari to quash opinion of Court of Appeals, determines facts from opinion of such court.—*State ex rel. English v. Trimble*, 9 S.W.(2d) 624.

**Sup. 1928.** On certiorari to quash Court of Appeals' opinion, Supreme Court will not determine correctness of opinion.—*State ex rel. Security Ben. Ass'n v. Cox*, 9 S.W.(2d) 953, quashing certiorari (App. 1927) *Spencer v. Security Benefit Ass'n*, 297 S.W. 989.

**Sup. 1928.** Supreme Court, on certiorari to quash opinion of appellate court for conflict, is limited to facts and issues stated in opinion.—*State ex rel. National Ammonia Co. v. Daues*, 10 S.W.(2d) 931, quashing certiorari (App. 1927) *Turley v. National Ammonia Co.*, 299 S.W. 53.

**Sup. 1928.** Opinion of Court of Appeals, in conflict with Supreme Court decision on like state of facts, must be quashed.—*State ex rel. McClay v. Cox*, 10 S.W.(2d) 940, quashing certiorari (App. 1927) *McClay v. Missouri Pac. Ry. Co.*, 299 S.W. 626.

**Sup. 1928.** Supreme Court may review rulings of Court of Appeals on similar facts and quash record for conflict of decisions.—*State ex rel. City of Macon v. Trimble*, 12 S. W.(2d) 727, quashing opinion (App.) *Downey v. City of Macon*, 6 S.W.(2d) 63.

**App. 1894.** On certiorari to a city council to vacate a dramshop keeper's license, granted under Acts 1891, p. 128, § 8, providing that it shall not be lawful to grant any dramshop license in certain cities until a majority of the assessed taxpaying citizens and guardians of minors owning property in the district where the dramship is to be kept shall sign a petition asking for such license, the return showed that the applicant filed a petition which was insufficient on its face. *Held*, that parol evidence to show that the petition was signed by two-thirds of the taxpaying citizens, etc., was properly excluded. Certiorari being a writ to determine the jurisdiction of the inferior tribunal, issues of fact arising before it are not open for review.—*State ex rel. Robinson v. City of Neosho*, 57 Mo. App. 192.

**App. 1900.** Certiorari brings up only such facts as appear on the face of the record, and where the record and papers in a proceeding in the county court to procure a dramshop license show that the application was verified as required by Rev. St. 1899, § 2993 (Ann. St. 1906, p. 1717), amended by Laws,

1907, p. 255, and that all steps to confer jurisdiction were taken, the record and papers are not reviewable whether they speak the truth or not.—*State ex inf. Keller v. Leonard*, 116 S.W. 14, 135 Mo. App. 143.

**App. 1910.** The writ of certiorari brings up nothing for review but the record of the tribunal to which it is directed, so that the evidence cannot be considered, though included in the return.—*State ex rel. School Dist. No. 18, Tp. 51, Rg. 34, of Platte County v. Sexton*, 132 S.W. 11, 151 Mo. App. 517.

**App. 1926.** Errors or mistakes in law or fact cannot be questioned or corrected in certiorari proceedings.—*State ex rel. Brince v. Franklin*, 283 S.W. 712, 220 Mo. App. 232.

**App. 1927.** "Certiorari" brings up for review record of inferior tribunal; duty of reviewing court being to consider facts on face of record going to jurisdiction.—*State ex rel. Shaw State Bank v. Pfeifle*, 293 S.W. 512, 220 Mo. App. 676.

#### 64 (2). Jurisdictional questions.

**Sup. 1902.** Certiorari brings up for review only such facts as appear from the face of the record, and which go to the jurisdiction of the tribunal to which the writ is sued out, and no other facts can be reviewed.—*State ex rel. Dalton v. Baker*, 70 S.W. 872, 170 Mo. 383; *State ex rel. Wright & Dalton Hardware Co. v. Same*, 70 S.W. 1118, 170 Mo. 394.

**App. 1909.** On certiorari, only such matters as appear on the face of the record which go to the jurisdiction can be reviewed.—*State ex rel. Kelley v. Wooten*, 122 S.W. 1103, 139 Mo. App. 231.

**App. 1912.** The scope of a writ of certiorari is to bring up for review from an inferior tribunal its records which go to show the jurisdiction of that tribunal, and the superior court can only consider such errors and defects as appear on the face of the record, and which are jurisdictional in their nature.—*School Dists. Nos. 18, 19, 29, 30, Webster County, v. Yates*, 142 S.W. 791, 161 Mo. App. 107.

#### 65. — Mode of review and trial de novo.

*See explanation, page iii.*

#### 66. — Presumptions.

**Sup. 1909.** Where the circuit court renders a personal judgment by default, it will be presumed, on certiorari, to have been

founded on a lawful return of a lawful writ and that presumption will prevail until the record is produced showing that either the writ or the service was not what the law requires.—*State ex rel. Brown v. Broadbuss*, 115 S.W. 1018, 216 Mo. 330.

Even when the record is silent as to the jurisdictional facts, the judgment of a court of general jurisdiction will be upheld, on certiorari by a presumption that the facts existed, until the contrary is shown by an exhibition of the whole record.—*Id.*

**Sup. 1909.** Where the court acted in a matter within its jurisdiction, the Supreme Court, on certiorari to review the determination must, in the absence of a showing to the contrary by the record, presume that the lower court performed its duty.—*State ex rel. Applegate v. Taylor*, 123 S.W. 892, 224 Mo. 393.

**Sup. 1916.** The Supreme Court, on certiorari to quash a judgment of the Court of Appeals for refusal of the Court of Appeals to follow the last previous ruling of the Supreme Court, will presume that the Court of Appeals stated all the facts of record.—*State ex rel. Tiffany v. Ellison*, 182 S.W. 996, 206 Mo. 604, quashing judgment (1914) *Coffey v. Tiffany*, 182 S.W. 495, 192 Mo. App. 455.

**Sup. 1921.** On certiorari to review action of the state board of health in suspending a physician's license for a term of years where the record was silent as to the number of members of board who were present at the meeting at which relator's license was ordered suspended, it will be presumed that the members of the board, being public officers, discharged their duty regularly and properly, and accordingly that, when the board acted, a majority of the members thereof were present as required by Rev. St. 1909, § 8317, now Rev. St. 1919, § 7336.—*State ex rel. Johnson v. Clark*, 232 S.W. 1031, 288 Mo. 659.

**Sup. 1922.** Where the Court of Appeals, in the opinion under review by certiorari, assumed that defendant was a fraternal benefit association without making an express finding to that effect, the Supreme Court can adopt the same assumption.—*State ex rel. National Council of Knights and Ladies of Security v. Trimble*, 239 S.W. 467.

**Sup. 1923.** In certiorari to review the opinion of the Court of Appeals on the ground that it is in conflict with opinions of the Supreme Court wherein the issue of whether

the facts in the instant case are analogous to the facts on which the Supreme Court has previously ruled the relator is entitled to the benefit of every reasonable inference to be drawn in his favor upon the whole evidence.—*State ex rel. Schaffer v. Allen*, 253 S.W. 768, 28 A. L. R. 1270.

**Sup. 1925.** In absence of contrary showing, assumed that issues of negligence submitted as specifically as they are alleged in petition.—*State ex rel. Lehrack v. Trimble*, 274 S.W. 416, 308 Mo. 597.

**Sup. 1926.** Supreme Court, on certiorari to quash opinion of Court of Appeals, must assume opinion correctly states nature of case, contents of petition, and relief sought.—*State ex rel. Kilkenny v. Daves*, 289 S.W. 550, quashing certiorari *Kilkenny v. Kilkenny*, 279 S.W. 184, 220 Mo. App. 535.

Supreme Court, on certiorari to quash opinion of Court of Appeals, will presume that latter court found fact necessary to authorize judgment rendered.—*Id.*

**App. 1911.** The common-law writ of certiorari which prevails in Missouri brings up for review only matters of record; and, where the record is sufficient on its face, the presumption is that the judgment is sustained by competent proof.—*Callier v. Chester P. & Ste. G. Ry. Co.*, 138 S.W. 660, 158 Mo. App. 249.

—67. — **Matters of discretion.**

*See explanation, page iii.*

—68. — **Questions of fact.**

**Sup. 1885.** On certiorari to review the proceedings of the board of police commissioners for St. Louis, established by Rev. St. 1879, p. 1528, in discharging the chief of police, the court will review the determination of the board as to whether there was sufficient evidence to warrant the board in discharging the officer for cause, and where the record of the commissioners failed to show that they heard sufficient evidence, or any evidence, or that any issue was raised or considered, the decision of the board will be set aside.—(1883) *State ex rel. Campbell v. Board of Police Com'rs of City of St. Louis*, 14 Mo. App. 297, affirmed 88 Mo. 144.

**Sup. 1914.** On certiorari the Supreme Court can quash a judgment of the appellate court only where the facts are undisputed and such court refused to follow the last previous ruling of the Supreme Court.—*State ex*

*rel. Iba v. Ellison*, 165 S.W. 360, 256 Mo. 644, quashing judgment (1913) *Iba v. Chicago, B. & Q. R. Co.*, 157 S.W. 675, 172 Mo. App. 141.

**Sup. 1919.** On certiorari to the Court of Appeals to compel review of a record of a cause, the Supreme Court is governed in determining the matter at issue by the finding as to evidence made by the Court of Appeals.—*State ex rel. Commonwealth Trust Co. v. Reynolds*, 213 S.W. 804, 278 Mo. 695.

**Sup. 1921.** On certiorari to quash the judgment of the Court of Appeals because it is contrary to previous rulings of the Supreme Court, the correctness of the finding of a fact by the Court of Appeals which took the case out of the rule relied on cannot be determined.—*State ex rel. Chicago & A. R. Co. v. Allen*, 236 S.W. 868, quashing certiorari (App.) *Wagner v. Chicago & A. R. Co.*, 232 S.W. 771, 209 Mo. App. 121.

**Sup. 1922.** The supervisory review of the Supreme Court on certiorari to the Court of Appeals extends only to whether the conclusions of law of the appellate court conflict with the latest pronouncement of the Supreme Court upon the same or similar state of facts, and does not warrant a review of error assigned in the findings of fact by the Court of Appeals.—*State ex rel. Raleigh Inv. Co. v. Allen*, 242 S.W. 77, quashing certiorari (App. 1921) *Raleigh Ins. Co. v. Cureton*, 232 S.W. 766, 294 Mo. 214.

**Sup. 1926.** Supreme Court in reviewing decision of Court of Appeals is bound by conclusion of appellate court as to facts.—*State ex rel. Koenen v. Daves*, 288 S.W. 14, quashing writ of certiorari (App.) *Koenen v. Terminal Railroad Ass'n*, 280 S.W. 73.

**Sup. 1926.** Supreme Court, on proceedings to quash opinion of Court of Appeals for conflict in decisions, could not review finding on issue of fact.—*State ex rel. Kilkenny v. Daves*, 289 S.W. 550, quashing certiorari *Kilkenny v. Kilkenny*, 279 S.W. 184, 220 Mo. App. 535.

**Sup. 1927.** Conclusions of Court of Appeals as to evidence are accepted on certiorari to quash decision for conflict of decisions.—*State ex rel. Al. G. Barnes Amusement Co. v. Trimble*, 300 S.W. 1064, 318 Mo. 274.

**Sup. 1927.** On certiorari to quash opinion of Court of Appeals, Supreme Court must accept Court of Appeals' finding of facts on oral testimony.—*State ex rel. Locke v. Trimble*, 298 S.W. 782.

**Sup. 1928.** Common-law writ of certiorari does not bring up evidence for review.—*State ex rel. Horton v. Clark*, 9 S.W.(2d) 635.

**Sup. 1929.** Supreme Court, on certiorari, cannot review facts, but only determine whether Court of Appeals' opinion contravenes prior Supreme Court decision (Const. Amend. 1884, § 8).—*State ex rel. Dean v. Daues*, 14 S.W.(2d) 990, quashing opinion (App. 1928) *Dean v. Dean*, 1 S.W.(2d) 235, and opinion conformed to (1929) 15 S.W.(2d) 1116.

#### 69. Determination and disposition of cause.

**Sup. 1916.** The Supreme Court on certiorari to review a judgment of the Court of Appeals for failure to follow the last previous Supreme Court ruling has no jurisdiction after determining such contrariety of ruling to enter judgment, but merely to quash the judgment and remand the case for rehearing.—*Majestic Mfg. Co. v. Reynolds*, 186 S.W. 1072.

**Sup. 1916.** On a writ of certiorari the Supreme Court in quashing the judgment of the Court of Appeals must remand the record for rehearing and cannot enter a final judgment in the case.—*State ex rel. Atchison, T. & S. F. R. Co. v. Ellison*, 186 S.W. 1075, 268 Mo. 225.

**Sup. 1917.** Upon certiorari this court may say that decision of Court of Appeals conflicts in certain particulars with previous opinions of this court, and still affirm judgment, where there is good reason in law for so doing.—*State ex rel. American Mfg. Co. v. Reynolds*, 194 S.W. 878, 270 Mo. 589, affirming judgment (App. 1916) *American Mfg. Co. v. Alt*, 184 S.W. 1167, 1169, certiorari denied (1917) *American Mfg. Co. v. Reynolds*, 38 S. Ct. 10, 245 U. S. 650, 62 L. Ed. 531, and writ of error dismissed (1918) *State of Missouri ex rel. American Mfg. Co. v. Reynolds*, 38 S. Ct. 189, 245 U. S. 635, 62 L. Ed. 523.

**Sup. 1917.** Supreme Court cannot, after quashing judgment and opinion of Court of Appeals on certiorari direct what action it shall take in the case.—*Schmohl v. Travelers' Ins. Co.*, 197 S.W. 60, answering certified questions (App. 1916) 189 S.W. 597.

**Sup. 1917.** On certiorari to review judgment of Court of Appeals the Supreme Court can only quash the record, and cannot direct the judgment to be entered by the Court of Appeals.—*State ex rel. Long v. Ellison*, 199

S.W. 984, 272 Mo. 571, quashing record in Court of Appeals *Clark v. Long*, 196 S.W. 409.

**Sup. 1920.** The fact that the Court of Appeals erroneously cited authorities that the assignments in the motion for new trial as to error in the instructions were too general for review in the Court of Appeals or the Supreme Court, not affecting the merits of the case, does not justify the Supreme Court in quashing the entire record of the Court of Appeals on certiorari; only the erroneous portion will be quashed.—*State ex rel. St. Louis Basket & Box Co. v. Reynolds*, 224 S.W. 401, 284 Mo. 372, affirming judgment (App. 1919) *Probst v. St. Louis Basket & Box Co.*, 207 S.W. 891.

**Sup. 1926.** Where Court of Appeals refused to follow last expressions of Supreme Court on question before it, and Supreme Court concluded that Court of Appeals was right in so doing, opinion of Court of Appeals will be sustained as already written.—*State ex rel. Thomas v. Daues*, 283 S.W. 51, 314 Mo. 13, 45 A. L. R. 1466, affirming judgment (App. 1925) *Thomas v. Chicago R. I. & P. Ry.*, 271 S.W. 862.

**Sup. 1926.** Opinion of Court of Appeals, which is clearly right, will not be quashed because of apparently contrary ruling of Supreme Court that is manifestly unsound.—*State ex rel. Woodson v. Trimble*, 287 S.W. 626, quashing certiorari to set aside opinion and judgment (App. 1925) *Woodson v. Leo-Greenwald Vinegar Co.*, 272 S.W. 1084.

**App. 1916.** Power of Supreme Court to order up record on certiorari and quash judgment of Court of Appeals as in excess of jurisdiction *held* to include the power to require the Court of Appeals to proceed with the cause in the true course of lawful jurisdiction.—*Iba v. Chicago, B. & Q. R. Co.*, 182 S.W. 135, 192 Mo. App. 297.

A Court of Appeals *held* to have no power to inquire into the jurisdiction of the Supreme Court on certiorari to issue mandate, requiring that the Court of Appeals rehear a cause wherein it had rendered a judgment *held* to be in excess of jurisdiction.—*Id.*

**App. 1928.** Mandate of Supreme Court on certiorari must be followed by Court of Civil Appeals.—*Benanti v. Security Ins. Co. of New Haven, Conn.*, 9 S.W.(2d) 673.

**App. 1928.** Court of Appeals is bound by ruling of Supreme Court quashing its record on certiorari.—*Universal Paper Products*

Co. v. R. E. Funsten Co., 6 S.W.(2d) 1020, conforming to opinion of Supreme Court (1927) State ex rel. R. E. Funsten Co. v. Becker, 1 S.W.(2d) 103.

**70. Appeal or other proceedings for review.**

**70 (1). Decisions reviewable and jurisdiction.**

*See explanation, page iii.*

**70 (2). Failure to present question in certiorari proceeding.**

Sup. 1921. Objection that petitioner for certiorari had no such interest as would entitle him to the writ cannot be made first on appeal from a dismissal of writ.—State ex rel. Plummer v. Gardner, 234 S.W. 53.

Sup. 1925. Irregularity of issuance of writ of certiorari not considered on appeal where not insisted on or raised by pleadings or argument during trial.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

Individuals sued and answering as members of township board in certiorari cannot question regularity of proceeding on appeal from judgment for relator.—Id.

Sup. 1928. Grounds of appeal, alleging error in admission of incompetent testimony and exclusion of competent testimony, *held* too general and indefinite.—State ex rel. Horton v. Clark, 9 S.W.(2d) 635.

**70 (3). Requisites of and proceedings for transfer of cause and supersedeas.**

*See explanation, page iii.*

**70 (3½). Parties.**

*See explanation, page iii.*

**70 (4). Record and assignments of error.**

Sup. 1908. On review of certiorari proceedings only the record of the inferior court or tribunal will be considered, and not the evidence taken by it, though included in the return.—State ex rel. Mount Mora Cemetery Ass'n v. Cassey, 109 S.W. 1, 210 Mo. 235.

Sup. 1916. In certiorari proceedings to review action of county court in establishing road, certified copies of county court records, as well as documentary evidence, and all other evidence considered at trial, should be incorporated in bill of exceptions in order to become part of record, and without bill of exceptions the Supreme Court can only consider the record proper, petition, respondents' return, relator's motion to quash, and judgment.

—State ex rel. Combs v. Staten, 187 S.W. 42, 268 Mo. 288.

Sup. 1925. Rule requiring specific statement of errors *held* not complied with.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

Appeal considered on merits despite non-compliance with rule as to specification of errors assigned.—Id.

**70 (5). Scope and extent of review in general.**

Sup. 1921. Petitioner for certiorari cannot complain that too short a time for return was fixed when answer was in fact made and the writ dismissed.—State ex rel. Plummer v. Gardner, 234 S.W. 53.

Sup. 1925. Action of township board in removing constable from office, as disclosed by record proper, limit of inquiry on appeal from judgment for removed officer in certiorari.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

App. 1922. In a suit to restrain sale on execution issued on a judgment for costs including only part of the items included in the fee bill, the full amount of which was carried into the execution, judgment for plaintiffs will not be reversed for error in denying a certiorari to test the validity of a nunc pro tunc order incorporating all the items into the judgment, where the nunc pro tunc order received in evidence in the injunction suit showed on its face that it was based, not entirely on the record and minutes, but upon extrinsic evidence.—Hunter Land & Development Co. v. Jackson, 243 S.W. 436, 210 Mo. App. 548.

App. 1928. Court of Appeals can determine whether county court order excluding land from village was fraudulently obtained on appeal from order quashing certiorari (Rev. St. 1919, § 8593).—Village of Grandview v. McElroy, 9 S.W.(2d) 829.

**70 (6). Presumptions.**

App. 1879. Where it is clear that a writ of certiorari was improperly issued, and it was dismissed, it ought to be presumed that the dismissal was on that ground; and a contention that a dismissal after a hearing was equivalent to a declaration on the part of the circuit court that there was no error or irregularity in the proceedings in the county court is without merit.—Moore v. Bailey, 8 Mo. App. 156.

**App. 1900.** Where a writ of certiorari has been issued, and there is no showing to the contrary, the court will presume on appeal that the circuit court, before it ordered the issuance of the writ, read the application therefor, found that the allegations of the petition as to the legal capacity of the petitioners to sue were true, and in the exercise of a sound discretion ordered the issuance of the writ; and that there is no bill of exceptions preserving the facts developed on a preliminary inquiry does not show that such inquiry was not in fact made.—State ex rel. Hill v. Moore, 84 Mo. App. 11.

**App. 1900.** In certiorari to review an action of a county court in granting a dram-shop license, the allegation in the petition for the writ and in the writ itself, showing that the petitioners became entitled to sue by reason of the refusal of both the Attorney General and prosecuting attorney to institute the proceeding on a request made to them, was not traversed by answer or return. A motion

to quash the writ was denied, and a return was subsequently made setting forth the proceedings of the county court in granting the license. *Held*, that the right of the petitioners to institute the proceedings will be conclusively presumed on appeal.—State ex rel. Moore v. McDavid, 84 Mo. App. 47.

**App. 1928.** On appeal from order quashing certiorari to review county court order excluding land from village, Court of Appeals must presume that petition recited all necessary jurisdictional facts (Rev. St. 1919, § 8593).—Village of Grandview v. McElroy, 9 S.W.(2d) 829.

70(7)-72. See explanation, page iii.

70 (7). Matters of discretion.

70 (8). Questions of fact.

70 (9). Determination and disposition of cause.

71. Costs.

72. Liabilities on bonds.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

# CHAMPERTY AND MAINTENANCE.

## *Scope-Note.*

**INCLUDES** officious intermeddling in a suit between others by assisting either party to carry it on, with or without an agreement to divide the subject of the litigation in the event of success; agreements for such division, or for the purchase of property held adversely, conveyances of such property, and agreements for the purchase of pretended titles or rights of action for the purpose of suing thereon; and criminal responsibility for unlawful maintenance of suits.

**For related matters under other topics, see Descriptive-Word Index.**

## *Analysis.*

- ➡ 1. Nature and elements in general.
  - 2. What law governs.
  - 3. Statutory provisions.
  - 4. Champertous contracts in general.
    - 4 (1). Agreements to conduct litigation or pay costs and expenses of suit, or to advance money therefor, in consideration of portion of recovery.
    - 4 (2). Agreements in consideration of information given or services rendered.
    - 4 (3). Agreements to dismiss or abandon suit.
    - 4 (4). Mortgage or sale of chattels held or claimed adversely.
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    - 4 (6). Persons liable.
    - 4 (7). Operation and effect.
    - 4 (8). Pleading.
- 5. Contracts and transactions with attorneys.
  - 5 (1). Validity of contract in general.
  - 5 (2). In absence of attorney's agreement to pay costs.
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  - 5 (4). Agreements with political bodies.
  - 5 (5). Agreements with third persons to procure claims for collection.
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  - 5 (7). Who may raise objections.
  - 5 (8). Operation and effect.
  - 5 (9). Pleading and evidence.
  - 5 (10). Questions for jury and instructions.
- 6. Transfers of claims for purpose of litigation.
  - 6 (1). In general.
  - 6 (2). What are litigious rights.
  - 6 (3). Assignments pendente lite.
  - 6 (4). Who may raise objections.
  - 6 (5). Operation and effect.
- 7. Grants of lands held adversely.
  - 7 (1). Validity of deed to land held adversely in general.
  - 7 (2). What constitutes adverse possession.
  - 7 (3). Alienations prohibited.

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Consult Pocket Part for later cases. For explanation, see page iii.



- 7 (4). Persons entitled to make objections.
- 7 (5). Operation and effect.
- 7 (6). Instructions.
- 7 (7). Questions for jury.

7½. Actions for damages.

8. Criminal responsibility.

9. — Offenses.

10. — Prosecution and punishment.

For related matters under other topics, see Descriptive-Word Index.

1. Nature and elements in general.

Sup. 1877. The common-law rule respecting champertous contracts is in force in this state.—*Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314.

Sup. 1907. The common law governing champerty is in force in Missouri.—*Kelerher v. Henderson*, 101 S.W. 1083, 203 Mo. 498.

Sup. 1909. The law of maintenance is in force in Missouri.—*Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 119 S.W. 576, 220 Mo. 327.

App. 1876. Champerty is a species of maintenance. Coke and Hawkins make it to consist in maintaining another's suit for a part of the land, or debt, or other thing in suit; but later definitions by Blackstone, Chitty, Jacob, Tomlins, Wharton, and Bouvier make it to consist in a bargain to divide the thing in suit, whereupon the champertor is to carry on the suit at his own expense.—*Duke v. Harper*, 2 Mo. App. 1.

2. What law governs.

See explanation, page iii.

3. Statutory provisions.

See explanation, page iii.

4. Champertous contracts in general.

4 (1). Agreements to conduct litigation or pay costs and expenses of suit, or to advance money therefor, in consideration of portion of recovery.

Sup. 1885. That a receiver refused to sue on a claim until the stockholders of the insolvent corporation had indemnified him against the payment of costs did not render the suit champertous.—*Bent v. Priest*, 86 Mo. 475.

App. 1876. A promise to pay the expenses or costs is essential to constitute maintenance.—*Duke v. Harper*, 2 Mo. App. 1.

App. Where, at the request of a policy holder of an insurance company, a receiver is authorized by the court to institute a certain suit, provided he is indemnified against costs, and he brings the suit in the court which made the order, defendant cannot show that the bond of indemnity is given by an attorney for the policy holder, and that the attorney is also employed by plaintiff to prosecute the suit for a contingent fee. It cannot be rightfully said that the law against champerty and maintenance has been contravened, especially when the grounds on which the court acted in making such order are not made to appear.—(1881) *Bent v. Priest*, 10 Mo. App. 543; (1884) *Bent v. Lewis*, 15 Mo. App. 40.

App. 1906. Where plaintiff, who was not an attorney, agreed to take up W.'s cause of action against defendant, employ lawyers, get up evidence at his own expense, and conduct the litigation to a termination, the contract was void for maintenance.—*Phelps v. Manicko*, 96 S.W. 221, 119 Mo. App. 139.

App. 1913. An agreement to maintain an action made for motives of gain is champertous, even though between relations.—*Taylor v. Perkins*, 157 S.W. 122, 171 Mo. App. 246.

App. 1919. Contract whereby defendant agreed to give 15 per cent. of whatever he received as his share of an estate for plaintiff's services in assisting him to recover it held not champertous.—*Behnke v. Rathsam*, 209 S.W. 976.

4 (2). Agreements in consideration of information given or services rendered.

See explanation, page iii.

4 (3). Agreements to dismiss or abandon suit.

See explanation, page iii.

4 (4). Mortgage or sale of chattels held or claimed adversely.

See explanation, page iii.

#### 4(5). Who may raise objections.

**Sup. 1919.** A defendant in an action cannot set up as a defense that the action is being prosecuted under a champertous agreement to which he is a stranger.—*Powell v. Bowen*, 214 S.W. 142, 279 Mo. 280, judgment set aside and cause reinstated April 1, 1920, case reargued May 10, 1920, and on May 18, 1920, former opinion again adopted.

**App. 1881.** The maker of a negotiable note cannot defend against the indorsee and holder on the ground that the holder acquired the note under a champertous agreement to pay costs of suit and retain a part of the sum collected as a fee.—*Million v. Ohnsorg*, 10 Mo. App. 432.

**App. 1901.** One not a party to a champertous contract cannot avail himself of its illegality.—*Bick v. Overfelt*, 88 Mo. App. 139.

#### 4(6). Persons liable.

**Sup. 1909.** Any interest asserted in good faith, whether contingent, vested, near, or remote, in pending litigation, relieves a party from the charge of maintenance.—*Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 119 S.W. 576, 220 Mo. 327.

The insurer in a policy indemnifying an employer against loss for injuries to employees has such an interest in a suit against the employer for injuries to an employee as justifies it aiding in the defense, and so doing does not make it liable for maintenance.—*Id.*

**App. 1905.** Plaintiff alleged that, having sued his employer, a mining company, for injuries, defendant insurance company, unlawfully, willfully, and maliciously, without interest, "maintained the mining company" by prosecuting an appeal from a judgment in favor of plaintiff; that defendant paid all the expenses of the appeal, which resulted in a reversal, after which defendant maintained the defense at its own expense, and in various ways caused delay, until plaintiff only succeeded in recovering a second judgment after the mining company became insolvent, and was then compelled to accept \$1,000 in settlement of a judgment for \$3,500; that, but for defendant's unlawful interference, plaintiff would have collected the first judgment, and would have secured a second judgment in time to have collected it before the mining company became insolvent. *Held*, that the petition stated a cause of action for maintenance.—*Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 85 S.W. 930, 110 Mo. App. 312.

Where an insurance company has indemnified a corporation from liability for injuries to its employees, it is not a volunteer in defending an action against insured for such injuries, and is therefore not liable, as an intermeddler, for maintenance.—*Id.*

#### 4(7). Operation and effect.

**Sup. 1857.** An instrument in the following form: "I promise to pay G. W. Crow \$100, if the M. T. Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners as already had and done by them. I also agree that, if the said road is opened and kept open, the said Crow shall have all the damages that may ever be assessed me for the same"—dated and signed, is not champertous on its face.—*Crow v. Harmon*, 25 Mo. 417.

**Sup. 1891.** The fact that a principal was instigated by a third person to institute a suit against his agent to set aside a conveyance of land to him as obtained by fraud, and that such third person paid him \$1,000 to do so, and agreed to pay all costs and attorney's fees in consideration of a half interest in the property recovered, does not deprive plaintiff of his right to have the deed to defendant annulled, especially when the champertous contract was voluntarily rescinded at the trial.—*Euneau v. Rieger*, 16 S.W. 854, 105 Mo. 659.

Unless plaintiff's title by which he seeks to enforce a right is infected by a champertous contract, the suit may proceed, though such a contract exists between plaintiff and another interested in the suit, as a party will not be turned out of court under those circumstances until he asks the aid of the court to enforce the champertous contract.—*Id.*

**App. 1901.** A party will not be deprived of relief because the contract on which he is prosecuting his suit is infected with champerty, when he is not seeking to enforce such contract.—*Bick v. Overfelt*, 88 Mo. App. 139.

#### 4(8). Pleading.

**Sup. 1884.** A plea of want of failure of consideration is insufficient to raise the defense of champerty.—*Moore v. Ringo*, 82 Mo. 468.

**Sup. 1912.** Where a bill in equity did not on its face savor of champerty or maintenance, defendants could not avail themselves of this defense without having pleaded

it.—Johnson v. United Rys. Co. of St. Louis, 152 S.W. 362, 247 Mo. 326, judgment modified 152 S.W. 374, 247 Mo. 326.

⚡5. Contracts and transactions with attorneys.

⚡5 (1). Validity of contract in general.

**Sup. 1906.** A contract for a contingent interest in the subject-matter of litigation by way of compensation for professional services is not champertous.—Taylor v. St. Louis Transit Co., 97 S.W. 155, 198 Mo. 715.

**Sup. 1912.** Under Rev. St. 1909, § 965, authorizing contingent fee contracts, the fact that the fee of a judgment creditor's attorney in a creditor's suit was contingent on success did not show champerty or maintenance.—Johnson v. United Rys. Co. of St. Louis, 152 S.W. 362, 247 Mo. 326, judgment modified 152 S.W. 374, 247 Mo. 326.

**App. 1881.** Agreement between attorney and client as to purchase by former at execution sale as champertous. See Kinealy v. Macklin, 10 Mo. App. 582, 583, memorandum.

**App. 1909.** A contract by an attorney with his client for a contingent fee, to be paid the attorney out of the proceeds of a pending suit, if properly entered into, is expressly authorized by Laws 1901, p. 46 (Ann. St. 1906, § 4937—2).—Reagles v. Robertson, 115 S.W. 1042, 135 Mo. App. 306.

**App. 1911.** Where an attorney having procured a surety on an injunction bond for a client, after procuring a permanent injunction, and the surety having been charged as garnishee for a deposit in his hands, as indemnity, promised the surety that he would guarantee the surety against loss above the amount of the deposit, if the latter would permit an appeal from the judgment in garnishment, such agreement was not champertous.—Dent v. Arthur, 137 S.W. 285, 156 Mo. App. 472.

**App. 1913.** Advances made by an attorney to his client with the expectation of being reimbursed by him are proper.—Taylor v. Perkins, 157 S.W. 122, 171 Mo. App. 246.

⚡5 (2). In absence of attorney's agreement to pay costs.

**App. 1919.** It is neither against public policy nor champertous for an attorney to lend his client money after the relationship of attorney and client already exists, and the loan forms no part of the inducement to bring about that relationship or to induce the client to engage in litigation, and there is no in-

demnity for client's liability for costs.—Mytton v. Missouri Pac. R. Co., 211 S.W. 111.

⚡5 (3). As affected by attorney's agreement to pay costs and expenses.

**Sup. 1884.** An agreement between attorney and client that the latter shall buy land and convey half of it to the former, who is then to pay half the expense of a suit to recover the land, is not champertous.—Moore v. Ringo, 82 Mo. 468.

**Sup. 1906.** A contract with three plaintiffs having separate causes of action, for a contingent attorney's fee, is not rendered champertous as to the fee in two cases which were commenced by the fact that one of the attorneys afterwards became surety for costs in an action commenced for the third plaintiff.—Taylor v. St. Louis Transit Co., 97 S.W. 155, 198 Mo. 715.

**Sup. 1907.** A contract between plaintiff and defendant, an attorney, which provides that in consideration of services rendered by plaintiff in procuring bonds of a county as described in a receipt, to be sued on by defendant in accordance with a contract, appended to the receipt, defendant agrees to pay plaintiff one-half of the fee accruing in accordance with its terms, it being understood that plaintiff "shall pay one-half of any and all reasonable expenses \* \* \* that may be necessary and proper" to insure the successful prosecution of the suit, does not bind plaintiff to pay any part of the costs of a suit on the bonds, and is not champertous on its face, though the contract appended to the receipt stipulates that, in case a suit is defeated, the attorney will pay all the costs thereof.—Kelerher v. Henderson, 101 S.W. 1083, 203 Mo. 498.

**Sup. 1909.** Though plaintiff's counsel executed a cost bond for him in accordance with a usual custom, because they knew he was good for the costs, and without any understanding with any one on the question, a contract to bring and prosecute a proper suit to recover land, in consideration of one-half the land recovered, was not champertous.—Shelton v. Franklin, 123 S.W. 1084, 224 Mo. 342, 135 Am. St. Rep. 537.

**App. 1904.** An agreement by an attorney to pay all or some of the court costs to accrue in a suit which he is employed to prosecute is champertous.—Constock v. Flower, 84 S.W. 207, 109 Mo. App. 275.

**App. 1913.** A contingent fee is not such an interest in the cause of action as will relieve the contract for the fee from being

champertous, where the attorney agrees to pay the costs.—Taylor v. Perkins, 157 S.W. 122, 171 Mo. App. 246.

The attorney's lien statute, providing that the compensation of an attorney is governed by an agreement expressed or implied, which is not restrained by law, does not relieve an agreement by an attorney to pay costs of its champertous character.—Id.

Rev. St. 1900, § 965, allowing an attorney to contract for a contingent fee, gives him no right to agree to pay the costs.—Id.

**App. 1919.** Although a written contract of employment between attorneys and their client in a personal injury action does not provide that the attorneys pay any part of the costs or expenses, the contract is nevertheless champertous if the agreement in fact contemplates the payment of such costs or expenses.—Mytton v. Missouri Pac. R. Co., 211 S.W. 111.

#### 5 (4). Agreements with political bodies.

*See explanation, page iii.*

#### 5 (5). Agreements with third persons to procure claims for collection.

*See explanation, page iii.*

#### 5 (6). Agreements whereby attorney acquires interest in subject-matter.

If the attorney makes no agreement to furnish money, an attorney's engagement to render services in the prosecution of a suit, in consideration of receiving a share of the property recovered, is not void for champerty.—Sup. 1877. Duke v. Harper, 66 Mo. 51, 27

Am. Rep. 314;

**App. 1876.** Duke v. Harper, 2 Mo. App. 1.

**Sup. 1877.** A contract with attorneys by which they are to receive a certain portion of the property sought to be recovered as their compensation, but which does not bind them to pay any portion of the expenses of the litigation, is not champertous.—Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314.

**Sup. 1906.** In a contract whereby attorneys were to receive in compensation for services in litigation for the recovery of land one-half the land, a provision whereby the client agreed not to compromise without the consent of her attorneys was not void as contrary to public policy.—Lipscomb v. Adams, 91 S.W. 1046, 193 Mo. 530, 112 Am. St. Rep. 500.

**App. 1881.** A contract between attorney and client that the attorney is to receive as compensation for his services a portion of the property in controversy, and that he is

to pay the cost of litigation, is champertous.—Million v. Ohnsorg, 10 Mo. App. 432.

**App. 1908.** The fact that insured in a fire policy assigned the same after a loss to secure fees owed to her attorneys, without any undertaking by them to pay the costs of the litigation, did not show a champertous assignment.—Ball v. Royal Ins. Co., 107 S.W. 1097, 129 Mo. App. 34.

**App. 1909.** A stipulation in a contract for a contingent fee that the client shall make no compromise without the attorney's consent is valid, and not opposed to public policy, as indicated by Attorney's Lien Act (Laws 1901, p. 46; Ann. St. 1906, § 4937—2), restricting compromises by litigants to the detriment of the attorney's lien.—Beagles v. Robertson, 115 S.W. 1042, 135 Mo. App. 306.

**App. 1910.** A contract between an attorney and client as to the prosecution of a claim for personal injuries, whereby the attorney is to be paid for his services 50 per cent. of the amount recovered, either by suit or compromise was not void as contrary to public policy, because it also provided that the client would not settle or compromise his cause of action without his attorney's consent.—Wright v. Kansas City, Ft. S. & M. R. Co., 126 S.W. 517, 141 Mo. App. 518.

#### 5 (7). Who may raise objections.

**Sup. 1885.** Defendant, in an action by a receiver, cannot object to the maintenance of the suit on the ground that there is a champertous agreement between the receiver and his attorney, since that is a matter to be presented to the court in which the receivership action is pending.—Bent v. Priest, 86 Mo. 475.

**App. 1881.** If the question were properly presented, the Court of Appeals would feel bound to hold that a contract under which plaintiff's attorneys are prosecuting is a matter which does not concern the defendant at all, and that, although it be champertous, such fact cannot be set up as a defense to the suit.—Bent v. Priest, 10 Mo. App. 543.

#### 5 (8). Operation and effect.

**Sup. 1886.** A motion to strike out a portion of the answer of defendant in an ejectment suit, setting up a champertous agreement between the plaintiff and his counsel, is well sustained, and the evidence offered thereon well excluded, provided the plaintiff's title by which he seeks to enforce his right is not affected by such contract.—Pike v. Martindale, 1 S.W. 858, 91 Mo. 208.

**Sup. 1907.** A contract not void as champertous which binds an attorney to pay to a third party a portion of the fees which he may earn and collect in pursuance of a champertous contract will be enforced.—*Kelerher v. Henderson*, 101 S.W. 1083, 203 Mo. 498.

**App. 1909.** A stipulation, in a contract for a contingent fee, that the client shall make no compromise without the attorney's consent is a divisible stipulation, and, even if void as against public policy, will not vitiate the other parts of the contract.—*Beagles v. Robertson*, 115 S.W. 1042, 135 Mo. App. 306.

**App. 1913.** An attorney cannot claim a fee or enforce a lien where his contract was champertous.—*Taylor v. Perkins*, 157 S.W. 122, 171 Mo. App. 246.

**App. 1919.** Where an attorney's contract of employment is champertous, it is void.—*Mytton v. Missouri Pac. R. Co.*, 211 S.W. 111.

5 (9). **Pleading and evidence.**

**App. 1904.** In an action by an attorney against his client for compensation, champerty is an affirmative defense, not available to defendant unless pleaded.—*Comstock v. Flower*, 84 S.W. 207, 109 Mo. App. 275.

**App. 1905.** In an action on an insurance policy by an attorney to whom the claim was assigned, the defense of champerty, not pleaded, was unavailable.—*Major v. Insurance Co. of North America*, 86 S.W. 883, 112 Mo. App. 235.

**App. 1914.** In a proceeding to determine an attorney's right under a contract with P. alleged to be champertous because of an agreement to pay costs, to a portion of the proceeds of a judgment, the testimony of another attorney that on being consulted by P. and requested to pay costs of the proposed action, he had refused to do so was admissible.—*Taylor v. Perkins*, 170 S.W. 409, 183 Mo. App. 204.

5 (10). **Questions for jury and instructions.**

*See explanation, page iii.*

6. **Transfers of claims for purpose of litigation.**

6 (1). **In general.**

**Sup. 1894.** The assignment of a bare right to file a bill in equity for fraud on the assignor is void, as against public policy and savoring of the character of maintenance.—*Wilson v. St. Louis & W. R. Co.*, 25 S.W. 527, 759, 120 Mo. 45.

**Sup. 1911.** A plaintiff suing in equity to rescind a sale of corporate stock to himself

on ground of fraud and deceit could not maintain therewith counts on numerous similar claims of others assigned to him; assignment of a mere right to file a bill for fraud committed on the assignor being void as savoring of maintenance.—*Ryan v. Miller*, 139 S.W. 128, 236 Mo. 406, Ann. Cas. 1912D, 540.

6 (2). **What are litigious rights.**

*See explanation, page iii.*

6 (3). **Assignments pendente lite.**

*See explanation, page iii.*

6 (4). **Who may raise objections.**

*See explanation, page iii.*

6 (5). **Operation and effect.**

**App. 1919.** In action to recover a sum paid defendant for interest in a debt and vendor's lien, answer alleging that defendant had no knowledge of his legal rights, but relied and acted solely upon advice of one of plaintiffs, an attorney, and that plaintiffs knew they were buying a lawsuit, etc., *held*, if true, to constitute a complete defense.—*Williams v. Powell*, 209 S.W. 607.

7. **Grants of lands held adversely.**

7 (1). **Validity of deed to land held adversely in general.**

**Sup. 1886.** Under Rev. St. 1879, § 673, any person claiming title to real estate may, though there be an adverse possession, convey his interest as if he were in actual possession.—*Allen v. Kennedy*, 2 S.W. 142, 91 Mo. 324.

7 (2)-8. *See explanation, page iii.*

7 (2). **What constitutes adverse possession.**

7 (3). **Alienations prohibited.**

7 (4). **Persons entitled to make objections.**

7 (5). **Operation and effect.**

7 (6). **Instructions.**

7 (7). **Questions for jury.**

7½. **Actions for damages.**

8. **Criminal responsibility.**

9. **Offenses.**

**App. 1927.** "Barratry" is offense of frequently exciting quarrels and suits.—*State v. Noell*, 295 S.W. 529, 220 Mo. App. 883.

10. **Prosecution and punishment.**

**App. 1927.** Indictment charging barratry, in that defendants stirred up "quarrels," "strifes," suits and "controversies," *held* insufficient to apprise them of issues they must meet (Rev. St. 1919, § 3174).—*State v. Noell*, 295 S.W. 529, 220 Mo. App. 883.

# CHARITIES.

## *Scope-Note.*

INCLUDES gifts, devises, bequests, and trusts for purposes regarded as charitable uses; their validity, operation, and effect in general, and application to them of doctrine of cy pres; organization, franchises, and powers of charitable societies; rights, powers, and liabilities of such societies, or of trustees of charities, or of the donors, and of beneficiaries; judicial control and protection of charitable societies and charities; and remedies relating thereto.

For related matters under other topics, see Descriptive-Word Index.

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Consult Pocket Part for later cases. For explanation, see page iii.

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**For related matters under other topics, see Descriptive-Word Index.**

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# **I. CREATION, EXISTENCE, AND VALIDITY.**

## **☞1. Nature of charities.**

**Sup. 1890.** The Widows' & Orphans' Home Society of Missouri, incorporated under act of March 19, 1860 (Sess. Acts 1866, p. 69), cannot be classed as a public charity.—*Tyree v. Bingham*, 13 S.W. 932, 100 Mo. 451.

**Sup. 1919.** A "public charity" is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, by bringing their minds under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, or by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

**App. 1907.** An association established under Rev. St. 1899, c. 12, art. 11, providing for organization of benevolent, religious, scientific, etc., associations, the charter of which provides that its object shall be to conduct and control a certain hospital, to provide medical treatment free to the poor, and to train and educate nurses, which has no stock, and pays no dividends, but devotes any income from paying patients to the improvement and maintenance of the hospital, which receives persons free of charge for board even, when unable to pay, and furnishes other places, known as free institutions, with physicians, nurses, and medicines, gratuitously, is a charity.—*Adams v. University Hospital*, 99 S.W. 453, 122 Mo. App. 675.

**App. 1910.** A "public trust" is one in which the public at large, or some undetermined portion of it, have a direct interest or property right, or in which the beneficiaries cannot be ascertained with certainty.—*Holman v. Renaud*, 125 S.W. 843, 141 Mo. App. 399.

## **☞2. What law governs.**

*See explanation, page iii.*

## **☞3. Constitutional and statutory provisions.**

**Sup. 1860.** St. 43 Eliz., concerning charitable uses, prevails in Missouri.—*Chambers v. City of St. Louis*, 29 Mo. 543.

**Sup. 1889.** 2 Rev. St. 1879, §§ 5976, 5977, do not apply to benevolent or charitable corporations (Laws 1881, p. 87).—*Whitmore v. Supreme Lodge Knights and Ladies of Honor*, 13 S.W. 495, 100 Mo. 36.

**Sup. 1911.** There being no statute in this state defining a public charity, the question as to whether a particular donation constitutes a public charity must be determined from the rules of the common law.—*Buchanan v. Kennard*, 136 S.W. 415, 234 Mo. 117, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

The statute of charitable uses, or St. 43 Eliz. c. 4, as enacted by Parliament, together with the common law of England upon the same subject, was made a part of the law of this state.—*Id.*

The charities enumerated in the statute of charitable uses (St. 43 Eliz. c. 4) is not alone determinative of what constitutes a public charity under the laws of this state, as it was not intended by such statute to abrogate the existing law as to public charities or to limit the remedy provided to the charities particularly designated, and hence a donation which prior to the statute of Elizabeth was recognized as a public charity will be treated as such under the laws of this state, though it may not fall within the terms of those so enumerated.—*Id.*

## **☞4. Validity of gifts and trusts in general.**

**Sup. 1876.** Testatrix made a will containing a devise to an archbishop of the Roman Catholic Church in his official capacity for the benefit of the church. After the adoption of the Constitution of 1865, forbidding any gift, bequest, or devise to any religious order or denomination, testatrix altered her will, making the devise absolute to the devisee personally. The change was made to evade the law, it being understood that the devisee should take, as before, for the benefit of the church. *Held*, that the latter devise, being a fraud on the policy of the law, was void.—*Kenrick v. Cole*, 61 Mo. 572.

**Sup. 1917.** A charitable trust must be clear, definite, and certain, as to subject, object, and terms, but the courts will not concern themselves with the wisdom or propriety of the trust or the character of the beneficiary.—*Jones v. Patterson*, 195 S.W. 1004, 271 Mo. 1, L. R. A. 1917F, 660.

That the interest in a charitable trust may be generally expressed will not necessarily cause the trust to fail for uncertainty of its object, if the particular mode of application may be rendered susceptible of direction by a court of equity.—*Id.*

Notwithstanding the permissibility of a general declaration, if the charity does not by



its own terms fix itself on a well-defined object, or is not susceptible of such interpretation by the courts, but is general and indefinite, it must fail.—Id.

**Sup. 1927.** Bequest of money to German Red Cross for relief of widows, orphans and invalids of World War *held* not void as against public policy; "enemy" (Rev. St. Mo. 1919, §§ 500-594; Trading With the Enemy Act [50 USCA Appendix § 1 et seq.]; Const. U. S. art. 3, § 3; Const. Mo. art. 2, § 13).—In re Rahn's Estate, 291 S.W. 120, 316 Mo. 492, 51 A. L. R. 877, certiorari denied Martin v. Ahrens, 47 S. Ct. 591, 274 U. S. 745, 71 L. Ed. 1325.

Bequest to German Red Cross for relief of widows, orphans, and invalids of World War did not fail because it showed intent to grant immediate relief and payment was delayed.—Id.

**App. 1911.** Decedent, a short time before his death, was the owner of three notes executed by a church congregation; two for \$500 and one for \$1,000. He sent for the pastor and church treasurer and handed the notes to the treasurer, with the request that he destroy one of the \$500 notes as a contribution to the church, and that the other two be used by the pastor and treasurer for certain other charities, to be paid out after decedent's death. As a part of the same transaction, he signed an instrument reciting that he freely intrusted to the pastor and treasurer the notes described, to be paid out in a specified manner for the benefit of such charities. *Held* to constitute a valid gift inter vivos in trust for the benefit of the charities mentioned.—Telle v. Roever, 139 S.W. 256, 159 Mo. App. 115.

#### 5. Subject of gift.

*See explanation, page iii.*

#### 6. Form of gift.

*See explanation, page iii.*

#### 7. Character and capacity of beneficiaries.

**Sup. 1916.** Where there were no such organizations or mission boards as those referred to in a will bequeathing money to them, the public charity intended by testator would fail for want of any taker.—Cummins v. Dent, 189 S.W. 1161.

#### 8. Number of beneficiaries.

*See explanation, page iii.*

#### 9. Purposes of gift.

Construction as to purposes of gift, see post, 36.

#### 10. — In general.

**Sup. 1911.** A devise "in trust for the purpose of erecting and maintaining a hospital for sick and injured persons without distinction of creed" is for a purpose recognized as a public charity prior to the enactment of the statute of charitable uses (St. 43 Eliz. c. 4), and hence is to be regarded as a public charity under the laws of this state.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

The enumeration in the statute of charitable uses (St. 43 Eliz. c. 4) of "aged, impotent, and poor people," and "maintenance of sick and maimed soldiers and mariners," and "aid and help to young tradesmen," as recognized purposes of public charities, indicates that the poverty of the recipients of benefits from a charity is not an essential requisite to constitute the donation a public charity; and hence a devise "in trust for the purpose of erecting and maintaining a hospital for sick and injured persons" is not invalid as a public charity, in that it does not impose poverty as a condition to the receipt of benefits.—Id.

That a public charity for the creation of a hospital included a direction for the payment of a sum to a relative of testator monthly and another sum for the keeping of the burial lot of testator in repair, which payments were made a charge on the charitable fund, did not change the nature of the main gift so as to deprive it of the character of a public as distinguished from a private charity.—Id.

**Sup. 1912.** Enumeration of charities in the statute of charitable uses (St. 43 Eliz. c. 4) is not exclusive, and there are other objects deemed charitable in a legal sense.—Strother v. Barrow, 151 S.W. 960, 246 Mo. 241.

Any gift not inconsistent with law and promotive of the amelioration of the condition of mankind or the diffusion of useful knowledge is a "charity."—Id.

**Sup. 1915.** It is of the essence of a public charity that it should be for the benefit of the public at large or some portion thereof, or upon an indefinite class of persons.—Catron v. Scarritt Collegiate Institute, 175 S.W. 571, 264 Mo. 713.

**Sup. 1916.** Provision of a will that land or its value be put on interest for the use of wornout preachers in Methodist Episcopal Church in North Missouri Conference is sufficient in every respect to create a valid charitable use.—*Buckley v. Monck*, 187 S.W. 31.

**Sup. 1928.** English statute as to charitable uses, *held* part of common law. but enumeration of charities is not preclusive.—*Harger v. Barrett*, 5 S.W.(2d) 1100, 319 Mo. 633.

#### 11. — Relief of poor or unfortunate.

**Sup. 1920.** A corporate hospital, organized to nurse the sick and to exercise care for poor and aged by deaconesses, and to found and support a deaconess home, where nurses should be trained, etc., which issued no shares of stock and paid no profits to its members, *held* a charitable organization.—*Nicholas v. Evangelical Deaconess Home and Hospital*, 219 S.W. 643, 261 Mo. 182.

The charitable character of a corporate hospital was not lost, because it received pay patients and the major portion of its income was derived from such patients.—*Id.*

#### 12. — Education.

**Sup. 1888.** A gift of real estate in Missouri to the Missouri Historical Society and the Academy of Science of St. Louis, being for the promotion of science, education, and the diffusion of useful knowledge, is valid as a charity, though not so denominated in the deed.—*Missouri Historical Soc. v. Academy of Science*, 8 S.W. 346, 94 Mo. 459.

**Sup. 1899.** A devise of property to constitute a botanical garden, with a museum and library connected therewith, "so as to provide for the use of the public of a botanical garden easily accessible, which shall be forever kept up and maintained for the cultivation and propagation of plants, flowers, fruits, and forest trees, and other productions of the vegetable kingdom, and a museum and library connected therewith, and devoted to the same, and to the science of botany, horticulture, and allied objects," to be preserved "to the use and enjoyment of the public for all time," coupled with provisions for the enlargement of the garden, museum, and library, and for the establishment of a fully-equipped school of botany, defines a charity, and creates a charitable trust.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

**Sup. 1906.** A bequest for the tuition or education of poor children under the age of

16 years of age within a certain district is a charity.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

**Sup. 1915.** A deed whereby land was conveyed to an institution for general education by a corporate member and his wife for its "use and benefit," and the land or proceeds was to be applied to endow professorship and memorialize the name of a deceased son, created a public charity.—*Catron v. Scarritt Collegiate Institute*, 175 S.W. 571, 264 Mo. 713.

**Sup. 1920.** Under the law of Kansas, as under the rule in Missouri, a trust for educational purposes is a public charity, so that a will creating a trust for the higher education of the children of a designated school district is not void as attempting to create a perpetual trust for a private charity.—*Musser v. Musser*, 221 S.W. 46, 281 Mo. 649.

**App. 1883.** A gift to promote the public good by encouraging learning, science, and the useful arts, is a charity.—*State ex rel. Hudson v. Academy of Science*, 13 Mo. App. 213.

#### 13. — Promotion of religion.

**Sup. 1913.** A grant of property to trustees to furnish a site for a church is a charitable trust.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

**Sup. 1914.** A gift of residue in trust for the purchase and maintenance of a parsonage and a church edifice "and secondarily for the general advancement of Christianity" *held* a gift to a charitable use and valid.—*Sandusky v. Sandusky*, 168 S.W. 1150, 261 Mo. 351.

**Sup. 1916.** Gift to foreign and home mission boards of Southern Baptist Convention, and to State Board of Missions, as constituted by General Association of Baptist Churches of State, *held* to create a public charity, to disseminate their principles and practices.—*Cummings v. Dent*, 189 S.W. 1161.

**Sup. 1928.** Bequest of property to church for church house *held* gift for "charitable use" or "public trust."—*Harger v. Barrett*, 5 S.W. (2d) 1100, 319 Mo. 633.

English statute, under which donation for repair of church created charitable use, *held* part of common law.—*Id.*

Will bequeathing property to Baptist Church on death of testator's widow and son without further issue created charitable

use, vesting property in church on condition named.—Id.

14. — Public institutions and improvements.

*See explanation, page iii.*

15. — Care or improvement of burial grounds or lots.

Sup. 1911. Where testator created a trust of 500 acres of land to maintain a public burying ground, it was not affected by the fact that the will directed that the cemetery should include a private burying ground in which testator's father, mother, and certain of their descendants were buried, the title to which was not in testator, so that, unless the trustees were able to secure the same, it could not be included in the cemetery provided for.—*Stewart v. Coshov*, 142 S.W. 283, 238 Mo. 662.

Where testator left his property to trustees to establish a cemetery for the benefit of testator's "large circle of relatives and friends," testator's intent was to establish a public cemetery, and not a private burying ground.—Id.

Const. art. 2, § 8, authorizes the creation of corporations to hold title to church edifices, parsonages, and cemeteries. Article 10, § 6, exempts cemeteries from taxation in the same connection with the exemption of property used exclusively for religious worship for schools, and for purposes purely charitable. Rev. St. 1909, § 3435, authorizes the formation of corporations for certain purposes, including any association formed to provide for some good in the way of benevolence useful to the public, specifying in that connection any association formed for religious purposes, or to provide or maintain a cemetery, and, after enumerating other purposes, concludes "and in general, any association, society, company, or organization which tends to the public advantage in relation to any or several of the objects above enumerated." *Held*, that the purposes for which charitable trusts may be created, as specified in the English Statute 43 Elizabeth, c. 4, were not exclusive, and that under such Constitution and statutory provisions a trust to establish and maintain a cemetery was valid and enforceable as a charitable use.—Id.

16. — Prayers or masses.

*See explanation, page iii.*

17. Certainty as to property.

Sup. 1879. Obscurity in the language of a bequest for a recognized charity will not

be suffered to defeat the purpose of the testator.—*First Baptist Church v. Robberson*, 71 Mo. 326.

18. Necessity of trustee.

Sup. 1910. In the creation of charitable trusts there must be a separation of the legal estate from the beneficial enjoyment indicated by words of donor, to prevent a merger.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

Where testator by his will bequeathed the residue of his property to the capital of township school fund, to the capital of public school fund, and to the capital of state school fund, no trust was created because of failure to designate a trustee capable of taking.—Id.

In view of Rev. St. 1909, § 583, a court of equity, in order to sustain a trust in a will cannot go to the extent of incorporating into the will the names of the donees who would take legal title to the funds bequeathed.—Id.

19. Certainty as to trustees or donees.

Sup. 1919. Where testator bequeathed the residue of his estate to the capital of a township, county, and state public school fund, and directed his executor to pay the property over to the lawful custodians of such funds, such direction was insufficient as a designation of the donees of the property under a charitable trust.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

Where testator bequeathed the residue of his estate to the capital of a county school fund, the names of the judges of the county court could not be inserted as custodians of the property; a charitable trust not having been sufficiently created to make applicable the provisions of Rev. St. 1909, § 3747.—Id.

Sup. 1927. Bequest to German Red Cross for relief of widows, orphans, and invalids of World War will not fail because Red Cross Society named did not exist.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A. L. R. 877, certiorari denied *Martin v. Ahrens*, 47 S. Ct. 591, 274 U. S. 745, 71 L. Ed. 1325.

20. Capacity of trustees or donees to take.

20 (1). Capacity in general.

App. 1881. Discontinuance of functions of charitable society. *See Soldiers' Orphans' Home v. Wolff*, 10 Mo. App. 596, memorandum.

⚡20 (2). Corporations.

**Sup. 1914.** Gift in trust for a church corporation *held* not invalid on the ground that the corporation was not authorized by law to hold title to a trust fund.—*Sandusky v. Sandusky*, 168 S.W. 1150, 261 Mo. 351.

**Sup. 1916.** In a suit to secure legal title to real estate, members of a religious order incorporating under Rev. St. 1899, § 1397, now Rev. St. 1909, § 3435, to maintain such religious order, and in co-operation therewith to perform benevolent works, *held* not to be a "religious corporation," within Const. art. 2, § 8, and article 10, § 21.—*Society of Helpers of Holy Souls v. Law*, 186 S.W. 718, 267 Mo. 667.

In a suit to secure legal title to real estate, members of a religious order, incorporating under Rev. St. 1899, § 1397, now Rev. St. 1909, § 3435, to maintain such religious order and in co-operation therewith to perform benevolent works, *held* to be a benevolent corporation.—*Id.*

In articles of a benevolent corporation stating its purpose to maintain a certain religious order, and "in connection with same" to perform benevolent works, the words "in connection with same" mean in co-operation with such religious order.—*Id.*

⚡20 (3). Voluntary unincorporated associations.

**Sup. 1879.** Under Const. 1865, art. 1, § 13, prohibiting gifts, sales, or devises of land or of chattels for the use, benefit, or support of any minister or of any church, except in accordance with section 12 of the article, which permits a gift, sale, or devise of one acre of ground in a town or city, a bequest of \$5,000 for the purposes of a church building, and of \$1,000 for the support of a minister, is void.—*First Baptist Church v. Robberson*, 71 Mo. 326.

**Sup. 1887.** Where the purpose of an organization would properly be termed a charity, a gift to it will not fail because it was not incorporated until after the gift was made.—*Missouri Historical Soc. v. Academy of Science*, 8 S.W. 346, 94 Mo. 459.

**Sup. 1890.** Although ordinarily there must be a devisee in existence capable of taking in order to make the devise a valid one, yet a charitable devise or bequest will be upheld and enforced, although it is made to a voluntary unincorporated association.—*Lilly v. Tobbein*, 15 S.W. 618, 103 Mo. 477, 23 Am. St. Rep. 887.

**Sup. 1916.** There is no principle of law which forbids a charitable gift to an unincorporated religious body or any of its orders, whether it be Protestant or Catholic.—*Society of Helpers of Holy Souls v. Law*, 186 S.W. 718, 267 Mo. 667.

**Sup. 1917.** A devise to an orphan asylum is not void for indefiniteness of beneficiary, where there was an orphan asylum of that name known to the testator and to which he had made contributions, though it was unincorporated.—*Schneider v. Kloepple*, 193 S.W. 834, 270 Mo. 389.

**Sup. 1919.** Under Rev. St. 1909, § 3746, a county court may act as a trustee of a charitable trust.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

**Sup. 1928.** Unincorporated church *held* empowered to receive property bequeathed to it in will, and could appoint trustees to dispose thereof as directed in will.—*Harger v. Barrett*, 5 S.W.(2d) 1100, 319 Mo. 633.

⚡20 (4). Associations or corporations to be created or incorporated.

*See explanation, page iii.*

⚡20 (5). Municipal bodies or corporations.

**Sup. 1860.** A testator gave an equal undivided third of all his property to the city of St. Louis, in Missouri, in trust, to constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the West. The testator left a large estate, the greater part of which consisted of lands situate in St. Louis county, beyond the limits of the city. *Held*, that the devise was valid; that the city of St. Louis was capacitated to take all the property embraced within the terms of the will, upon the trusts therein indicated, and to administer said trusts, subject to the control of a court of equity.—*Chambers v. City of St. Louis*, 29 Mo. 543.

Municipal corporations may take and hold property in trust for charitable uses.—*Id.*

**Sup. 1892.** Municipal corporations may take and hold property in trust for charitable uses.—*Barkley v. Donnelly*, 19 S.W. 305, 112 Mo. 561.

⚡21. Certainty as to beneficiaries.

Construction as to beneficiaries, see post, ⚡34.

21 (1). In general.

**Sup. 1916.** Indefiniteness as to the individual recipients of the bounty is one of the elements of a charitable trust; otherwise it would be a private trust.—*Buckley v. Monck*, 187 S.W. 31.

**Sup. 1928.** Ordinarily trust for benefit of indefinite number is void.—*Dickey v. Volker*, 11 S.W.(2d) 278, certiorari denied (1929) 49 S. Ct. 252, 279 U. S. 839, 73 L. Ed. 986.

21 (2). Beneficiaries to be designated by trustees or donees.

**Sup. 1876.** Bequests for purposes of benevolence and general liberality, such as the trustee shall apportion or direct, cannot be supported, either as general trusts or for charitable uses.—*Schmucker's Estate v. Reel*, 61 Mo. 592.

**Sup. 1887.** A gift to a trustee or the executor to dispose of the property among such charitable and benevolent institutions or corporations in a particular city as he shall choose, is not void for uncertainty as to the beneficiaries.—*Howe v. Wilson*, 3 S.W. 390, 91 Mo. 45, 60 Am. Rep. 226.

**Sup. 1890.** A bequest to such charitable purposes as trustees may deem best is sufficiently definite.—*Powell v. Hatch*, 14 S.W. 49, 100 Mo. 592.

**Sup. 1894.** In gifts to a charitable use, mere obscurity or indefiniteness will not necessarily defeat the trust; but they will be upheld where they are made to a charity generally, if there is a trustee with power to make them definite and certain.—*Sappington v. Sappington School Fund Trustees*, 27 S.W. 356, 123 Mo. 32.

The owner of property conveyed it by a trust deed, and directed that the interest accruing thereon should be annually expended by the trustees in the education of "the most necessitous poor children" in the county in which he resided, and further directed that, in the event that the school funds of the state should become sufficient to educate all the poor children of the county, the board of trustees were authorized and requested to apply the interest of said fund "to such other objects of charity in said county as in their judgment may be most needy." *Held*, that the latter provision of the deed was valid.—*Id.*

21 (3). Gifts for relief of poor, unfortunate, or infirm.

**Sup. 1892.** Testator's will devised a certain tract of land to the city for the erection

of an orphan asylum, and further directed than an opera house be built on certain other lots, all profits of which should be applied to the support of the asylum. The will then directed that, after the devises and bequests hereinbefore made, and after the completion of the opera house, the remainder of the estate should be applied to building a religious school; and another item provided that, if the estate should be insufficient to build the opera house and reserve the tract for the orphan asylum, the executors should sell the lots and the tract, together with other remaining property, and out of the proceeds purchase another site for the opera house and orphan asylum, and build thereon such an opera house and asylum as the means will permit of. *Held*, that the trust on which the tract and the lots were devised was not void on the ground that the beneficiaries were not sufficiently definite and certain.—*Barkley v. Donnelly*, 19 S.W. 305, 112 Mo. 561.

**Sup. 1911.** A devise to designated trustees "in trust for the purpose of erecting and maintaining thereon a hospital for sick and injured persons without distinction of creed, under the auspices of the Methodist Episcopal Church South of the United States or its successor, under such rules and regulations as the trustees and their successors shall from time to time establish and maintain," is not invalid as a public charity, on the ground that it is indefinite as to the selection of the objects of the charity.—*Buchanan v. Kennard*, 136 S.W. 415, 234 Mo. 117, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

**Sup. 1927.** Bequest to German Red Cross for relief of widows, orphans, and invalids of World War will not fail because beneficiaries are too indefinite.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A. L. R. 877, certiorari denied *Martin v. Ahrens*, 47 S. Ct. 591, 274 U. S. 745, 71 L. Ed. 1325.

**Sup. 1928.** Legacy to named person for poor, homeless children *held* valid as not being too vague and uncertain.—*St. Louis Union Trust Co. v. Little*, 10 S.W.(2d) 47.

21 (4). Gifts for promotion of education.

*See explanation, page iii.*

21 (5). Gifts for promotion of religion.

**Sup. 1907.** A devise of property to the "Methodist E. Church, South, and missionary cause," was void and of no effect for being indefinite and uncertain.—*Board of Trustees of Methodist Episcopal Church, South, v. May*, 99 S.W. 1093, 201 Mo. 360.

**Sup. 1916.** Where 7 out of 17 of a religious order incorporate, using the name of the order as the corporate name, a devise to the name by which both the order and the corporation are known will pass title to one of them.—*Society of Helpers of Holy Souls v. Law*, 186 S.W. 718, 267 Mo. 667.

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**App. 1879.** Where it appears that plaintiffs accepted a trust and held the trust property for a voluntary association of persons, that they might have a place of religious worship and resort to it as usual for such purpose, the doctrines of equity, unaffected by the statute of uses, have a legitimate sphere of operation, and the purpose of the grant will be carried out by the preservation of the trust. The trust is of the class of charitable trusts, and it is a peculiarity of such trusts that equity will hold the gifts to be good, when, if they were for other purposes, they would be considered void on account of the uncertainty of the persons for whose benefit they were intended.—*Bredell v. Alexander*, 8 Mo. App. 110.

## 22. Certainty as to purpose of gift.

### 22 (1). Certainty in general.

**Sup. 1922.** The object and purpose of a charitable trust created by a devise must be clear, definite, and certain.—*National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry*, 239 S.W. 519, 293 Mo. 399.

### 22 (2). Purpose discretionary with trustee.

**Sup. 1907.** Testator bequeathed all his property to his wife for life, she, after providing for her own wants, to give such amounts to testator's relations as she might think proper, and the balance to advance the cause of religion and promote the cause of charity in such a manner as the wife might think would be most conducive to carrying out testator's wishes, with authority to lease and sell property for the benefit of the estate. *Held*, that such provisions were insufficient to constitute a valid public charity, which could be enforced by a court of equity

after the widow's death.—*Hadley v. Forsee*, 101 S.W. 59, 203 Mo. 418, 14 L. R. A. (N. S.) 49.

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**Sup. 1911.** A bequest to trustees and their successors forever, in trust for the purpose of erecting and maintaining a hospital for sick and injured persons without distinction of creed under the auspices of the Methodist Episcopal Church, or its successor, and under such rules and regulations as said trustees or their successors may from time to time establish, is invalid as a private charity, as its objects are indefinite, vague, and uncertain.—*Buchanan v. Kennard*, 136 S.W. 415, 234 Mo. 117, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912(1), 50.

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**Sup. 1917.** A trust declared for "missionary purposes" for the propagation of religion has as its subject and object synonymous terms, but such fact does not militate against its validity if the creator's purpose may be definitely determined.—*Jones v. Patterson*, 195 S.W. 1004, 271 Mo. 1, L. R. A. 1917F, 660.

A testamentary trust created for missionary purposes for the propagation of the Christian religion "in the name of my dear Saviour and for the salvation of souls," is too indefinite for enforcement, and is void.—*Id.*

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**Sup. 1899.** Where a definite charity is created the failure of the particular mode by which its dominant purpose is to be effectuated will not defeat the charity, for equity will substitute another mode.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

**Sup. 1911.** A devise to designated trustees for the erection and maintenance of a hospital to be conducted "under the auspices of the Methodist Episcopal Church South of the United States or its successor and under such rules and regulations as such trustees and their successors shall from time to time establish and maintain" is not invalid as a public charity on the ground that the objects for administering and carrying out the purposes of the gift are too indefinite.—*Buchanan v. Kennard*, 136 S.W. 415, 234 Mo. 117, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

24. **Acceptance by trustee or donee.**

*See explanation, page iii.*

25. **Partial invalidity.**

*See explanation, page iii.*

26. **Estoppel or waiver as to defects or objections.**

*See explanation, page iii.*

27. **Persons entitled to question validity of gift.**

**Sup. 1916.** Devise to name by which both a religious order and corporation passes title to order or corporation.—*Society of Helpers of Holy Souls v. Law*, 186 S.W. 718. See Charities, 21(5) in this Digest.

28. **Modification or revocation.**

**Sup. 1916.** In action to adjudge bequest to three named missions void on the ground that they had no legal existence, plaintiffs

should make Attorney General, the representative of public charities, a party, so that issue of their existence and capacity to take might be determined.—*Cummings v. Dent*, 189 S.W. 1161.

29. **Nonuser or misuser.**

**Sup. 1924.** It was not a diversion or abandonment of the charitable and pious use for which property was conveyed to a Methodist Episcopal Church as a place of worship, for it to convey it in trust as a place of worship for the Methodist Episcopal Church, South.—*First Methodist Church of Poplar Bluff v. Berryman*, 261 S.W. 73, 303 Mo. 475.

30. **Duration and termination.**

Application of doctrine of cy pres, see post,

37.

Title acquired, see post, 35.

**Sup. 1872.** A testator donated certain lands to a particular church. The church built on the lands having burned down, *held*, that his heirs could not reclaim the lands on the ground that the trust had ceased.—*Goode v. McPherson*, 51 Mo. 126.

**Sup. 1912.** The evidence to establish abandonment of a charitable use created by deed must be clear and conclusive.—*Strother v. Burrow*, 151 S.W. 960, 246 Mo. 241.

Abandonment of a charitable use involves the elements of intent to abandon permanently and the physical fact of nonuser.—*Id.*

Evidence *held* to support a finding that a charitable use created by a deed conveying land in trust for religious purposes was not abandoned.—*Id.*

**Sup. 1919.** Where land was granted to trustees of the Methodist Episcopal Church South in trust to be used, kept, etc., as a place of divine worship for the use of the ministry and membership of the church, on a sale of the land by the trustees of the church, the building being removed, the gift, being to charity, did not revert to the grantor.—*Glaze v. Allen*, 213 S.W. 784.

**Sup. 1920.** Conveyance of lots in trust for erection of house of worship and parsonage *held* violated by trustees erecting business building on part of lots for rental purposes and failing to erect parsonage.—*Lewis v. Brubaker*, 14 S.W.(2d) 982.

Reversion of title on violation of terms of trust for religious purposes will not be granted in favor of purchasers from grantors.—*Id.*

Neither grantor of property for charitable use nor heirs or grantees can claim reverter on violation of terms of trust, unless condition in grant authorizes claim.—*Id.*

**App. 1881.** Abandonment of incorporation. See *Soldiers' Orphans' Home v. Wolff*, 10 Mo. App. 596, memorandum.

## II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

### 31. General rules of construction.

See explanation, page iii.

### 32. Evidence to aid construction.

See explanation, page iii.

### 33. Trustees or donees.

**Sup. 1917.** Where a testator devised real property to an orphan asylum, the corporation which conducted the asylum is entitled to the property though it has a name different from the name of the asylum.—*Schneider v. Kloepple*, 193 S.W. 834, 270 Mo. 389.

### 34. Beneficiaries.

**Sup. 1906.** A bequest for the benefit of poor children residing at or within two miles of the town of Liberty refers to the town as it existed at the time of the execution of the will, and not as it might afterwards be constituted.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

A bequest for the education of "orphans or poor children" means orphans without estate to pay for such education and children whose parents are living, but are too poor to pay for it.—*Id.*

**Sup. 1916.** Indefiniteness as to individual recipients of bounty characterizes trust as charitable.—*Buckley v. Monck*, 187 S.W. 31. See Charities, 21(1) in this Digest.

**App. 1928.** Bequest under will of residue to trustees of named church, for support of superannuated preachers of named conference, *held* payable to preachers supported by conference as a whole.—*In re Aiken's Estate*, 5 S.W.(2d) 662.

### 35. Property included and title or interest acquired.

Application of doctrine of cy pres, see post, 37.

Termination of charity, see ante, 30.

**Sup. 1898.** Where lands have been donated, and become vested in a trustee for charitable uses, neither the donor nor his or

her heirs can ever reclaim it, and all right and interest therein or thereto is gone forever.—*Women's Christian Ass'n v. Campbell*, 48 S.W. 960, 147 Mo. 103.

**Sup. 1915.** Provisions of a deed to an educational institution construed, and *held* that a condition subsequent was neither expressed therein nor to be implied, and that the estate conveyed in fee did not revert when the institution ceased to exist.—*Catron v. Scarritt Collegiate Institute*, 175 S.W. 571, 264 Mo. 713.

**Sup. 1922.** Devise to charitable institution without reservation or limitation authorizing the executor to dispose of the property as he may think best and use the proceeds for the purpose of the charitable institution in the manner thought best by such institution *held* a clear gift, and not in the nature of a charitable trust.—*National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry*, 239 S.W. 519, 293 Mo. 399.

### 36. Purposes of gift.

Alteration of charter, see post, 40.

**Sup. 1894.** Testator left a fund in trust, the income to be spent "in the education of the most necessitous poor children" in the county; but if at any time the public funds should become sufficient to educate all the poor children of the county, then the income to be otherwise applied. It appeared that all the funds provided by law for the county for the past year maintained the school for less than seven months; that the seating capacity of the schools was less by over 2,000 than the number of children of school age; that the deficit for the year was some \$600. *Held*, that the contingency had not occurred.—*Sappington v. Sappington School Fund Trustees*, 27 S.W. 356, 123 Mo. 32.

**Sup. 1906.** The establishment of a system of free public schools to be supported by the state fund and by local taxation, but which was not compulsory on individual districts, and where school might be maintained for only part of the year, did not so certainly meet the purposes of a testator who left a bequest for the tuition and education of poor children under 16 years of age within a certain district as to require the removal of the restrictions as to age and territory within which the fund might be applied.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

**Sup. 1912.** A charitable trust created by deed conveying land to trustees of a Presby-

terian church is not violated by a transfer of the property to a Universalist Church.—*Strother v. Barrow*, 151 S.W. 900, 246 Mo. 241.

Where land conveyed to trustees of a Presbyterian church for religious purposes was conveyed by such trustees to the Universalist general conviction, without describing the business character of the grantee, the presumption was that the conveyance was for religious purposes, so that the second grantee acquired title.—*Id.*

§37. Application of doctrine of cy pres.

Termination of charity, see ante, §30.  
Title acquired, see ante, §35.

**Sup. 1872.** Where lands are vested in a corporation by devise for charitable purposes, and it is contemplated by the donor that the charity should last forever, the heirs can never have the lands back again; but, if it becomes impossible to execute the charity as expressed, another charity will be substituted by the court so long as the corporation exists.—*Academy of the Visitation v. Clemens*, 50 Mo. 167.

**Sup. 1875.** Though, in consequence of the nonincorporation of the church, for whose benefit a grant of land is made, there is no one in esse, at the time of making the grant, capable of receiving the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation.—*Schmidt v. Hess*, 60 Mo. 591.

**Sup. 1888.** The doctrine of cy pres, as applied to charitable gifts and trusts, is not in force.—*Missouri Historical Soc. v. Academy of Science*, 8 S.W. 346, 94 Mo. 459.

Equity has power to decree a sale of real estate conveyed jointly to two charitable institutions, for the purpose of erecting a building thereon for their joint use, and to authorize each society to use its portion of the proceeds of sale in the erection of a separate building for its own purposes; it being impracticable, from the location and surroundings of the property, to build on and use it jointly, as intended by the donor, this power being the exercise of the equitable doctrine of cy pres, and inherent in a court of equity as part of its jurisdiction over trusts, independent of St. 43 Eliz. c. 4, concerning charities.—*Id.*

**Sup. 1890.** Where land dedicated as a cemetery is no longer used for that purpose

the question will not be considered whether the land can be appropriated and used for other charitable purposes, germane to the original one, in accordance with the equitable doctrine of cy pres.—*Campbell v. City of Kansas*, 13 S.W. 897, 102 Mo. 326, 10 L. R. A. 593.

**Sup. 1898.** By virtue of its jurisdiction over trusts and charities, equity may invoke the doctrine of cy pres to effectuate a devise of land for an orphan asylum by directing the trustee to sell such land, which is unsuitable in location, and ordering the application of the proceeds to the erection of a building for the intended purpose on a tract of land elsewhere, which was donated for charitable purposes, the institution to be under the control and custody of an eleemosynary corporation having a like object.—*Women's Christian Ass'n v. Campbell*, 48 S.W. 960, 147 Mo. 103.

The difficulty of effectuating according to its terms a charitable trust which will call in force the doctrine of cy pres is only a reasonable one, and not such as to make the donor's plan a physical impossibility.—*Id.*

A testamentary direction that, should the fund created for the erection of an orphan asylum be inadequate, certain lands devised for the site thereof should be sold, and a new site and building purchased with the proceeds, does not prevent the application of the doctrine of cy pres by directing a sale of the land to provide funds for the erection of the building on lands held by a similar trust for a like purpose, where the growth of population has made the provision itself inadequate.—*Id.*

Beginning with the earlier case of *Chambers v. City of St. Louis*, 29 Mo. 543, decided in 1860, there has been an unbroken line of decisions that the equity branch of the courts has authority and power to mold the form of a charitable devise or gift to suit the necessities of changed conditions and surroundings, and when it has been found beneficial to the charity to alien its land and vest the proceeds in other funds or in a different manner, it was competent for the court to direct such sale and investment so long as no diversion of the gift is permitted.—*Id.*

**Sup. 1899.** It being the very essence of a charity that it shall endure forever, lands made the subject of a charitable trust are inalienable, unless by the terms of the trust express power is given the trustees to alienate them.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

Under an act of the Legislature providing that "it shall and may be lawful for" a named person to devise to trustees certain described lands for the creation of a charitable trust therein mentioned, and "by proper or apt words in said last will \* \* \* to provide that no absolute alienation shall ever be made of said lands," or any portion of the same, by the trustee therein appointed, the provision as to alienation is not a binding legislative direction, but is permissive only, conferring a power on the creator of the trust, which it was apprehended there would otherwise be no right or authority to do.—Id.

A will creating a charitable trust, and providing that the trustees shall not have the power to make any sale, conveyance, or disposition of the real estate devised, except to lease it for a term not exceeding 60 years, with covenants for a perpetual renewal thereof, does not deny the power of the trustees to alienate the real estate, as the method of leasing amounts to a substantial alienation, but merely limits the form of the alienation.—Id.

Where at the time of testator's death he was engaged in putting to a test his policy of letting property on ground leases, and, in his devise to trustees of a charity, directed that they lease the property devised for the purpose of procuring a fund to endow the charity, and forbade any different alienation, and after his death there developed and became fixed a widespread conviction in the minds of the people against accepting such ground leases, so that the trustees were unable to lease the property, although adjacent property had been improved and was in great demand, and the directions of the testator have become impossible of observance, the court is authorized to vary the details of the administration of the charity, and direct a sale of the property.—Id.

Where testator created a charitable trust, and provided that certain lands devised to the trustee should be leased for the purpose of providing a fund for the endowment of the charity, and denied to the trustees the right to otherwise alienate the same, and at the time of the execution of the will the courts, in construing one of a similar nature which provided that the lands should be leased for terms not exceeding five years, had held that the court had power, where conditions demanded it, to authorize the execution of leases for a longer period, a case is presented for the practical application of the rule that testators are supposed to know the rules by

which courts are guided in their administration of the law, as well in the case of charities as in those of individuals, and the testator is conclusively taken to have impliedly agreed, that, if it should become impossible to administer the trust in the manner proposed, the court might make any reasonable modification of this scheme which might at any time become necessary.—Id.

A statute authorizing the creation of a charitable trust by will, and a devise of lands to trustees, which shall be inalienable by such trustees, is to be construed to imply that the courts should have the same power of administration over this charity which exists under the rules of equity jurisprudence, and which they may exercise as to others; and, where conditions arise making it necessary in the administration of the charity, the court may decree the sale of such real estate.—Id.

The power of a court of equity to change the form of the administration of a charity from that provided in the instrument creating it is based on a change of circumstances permanent in its nature, making it substantially impossible to literally carry out or observe the forms or details of administration prescribed, or making it necessary to provide another form for administering the trust.—Id.

In the absence of an express provision of a charitable trust making land purchased by trustees as an investment of surplus funds inalienable, such lands are not affected by a general provision restraining the alienation of trust lands, or by the rule that lands made the subject of a charitable trust are inalienable.—Id.

In determining whether lands made the subject of a charitable trust are alienable, a difference should be noted between lands actually used for the charity itself, and lands set apart in order to provide, by means of their income or use, a fund for the endowment of the charity, as the latter presents a question of administration.—Id.

Sup. 1913. "Cy pres" is the doctrine of approximation in charitable trusts whereby the intent of a testator or grantor, which is impossible or impracticable literally, is carried out as near as possible.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

Sup. 1915. On abandonment of a sectarian educational institution, a court of equity, applying the cy pres doctrine to a memorial trust fund to endow the president's

chair should order it turned over for a like use to a like institution with which the former merged and it could not be used for a memorial church.—*Catron v. Scarritt Collegiate Institute*, 175 S.W. 571, 264 Mo. 713.

**Sup. 1919.** Where testator bequeathed the residue of his property to the capital of a township, county, and state public school fund, but altogether failed to designate the trustee, the cy pres doctrine had no application; no trust of any kind having been created by the will.—*Robinson v. Crutcher*, 209 S.W. 101, 277 Mo. 1.

**Sup. 1920.** In a suit by the trustee to have the court apply the cy pres to a trust fund created by decedent in his will "to furnish relief to all poor emigrants, and travelers coming to St. Louis, on their way bona fide to settle in the West," evidence held insufficient to show a total or partial failure of the object for which the trust fund was created.—*City of St. Louis v. McAllister*, 218 S.W. 312, 281 Mo. 26.

**Sup. 1924.** If the objects of a charitable trust fail, and no general intention is disclosed which could be administered in another way, the doctrine of cy pres is inapplicable.—*City of St. Louis v. McAllister*, 257 S.W. 425, 302 Mo. 152.

### 38. Conditions.

**Sup. 1894.** A testator provided that the income of a fund left by him in trust should be spent "in the education of the most necessitous poor children" in the county; but, if at any time the public funds should become sufficient to educate all the poor children of the county, the income should be otherwise applied. It appeared that all the funds provided by law for the county for the past year had maintained the school for less than seven months, that the seating capacity of the schools was less by 2,000 than the number of children of school age, and that there was a considerable deficit for the year. *Held*, that the contingency named in the bequest had not occurred.—*Sappington v. Sappington School Fund*, 27 S.W. 356, 123 Mo. 32.

**Sup. 1913.** Where property was conveyed to trustees for a site for a union church with the sole inhibition that the trustees of neither church could convey away its interest for other than church purposes, no condition subsequent or right to forfeiture which will cause the property to revert to the grantor or his heirs can be raised by implication.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

### 39. Incorporation and organization of charitable societies.

**Sup. 1890.** The Widows' & Orphans' Home Society of Missouri, incorporated under act approved March 19, 1866 (Sess. Acts 1866, p. 69), is a private corporation for such charitable or beneficial purposes as are set out in the articles of association.—*Tyree v. Bingham*, 13 S.W. 952, 100 Mo. 451.

**App. 1884.** Nature of a corporation, as being within Acts 1881, p. 87, relating to charitable associations. See *State v. Brawner*, 15 Mo. App. 597, memorandum.

### 40. Franchises and powers of charitable societies.

Change in objects of charity, see ante, 36.

**Sup. 1869.** The trustees of an incorporated eleemosynary institution have no authority to accept amendments to the charter which change the character and purpose of the institution, and divert the property from the uses which the giver designed, but only such amendments as may be necessary to adapt the management of the corporate affairs to changed conditions, or to enable the corporation to attain the objects of the founder by more appropriate means.—*State ex rel. Pittman v. Adams*, 44 Mo. 570.

**App. 1881.** A charitable corporation may take pay from such parents as are able to pay something for the support of their children.—*Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

### 41. Public aid.

See explanation, page iii.

### 41½. Statutory regulations.

See explanation, page iii.

### 42. Supervision by public officers.

See explanation, page iii.

### 43. Judicial supervision or administration.

**Sup. 1860.** The court of chancery has jurisdiction over bequests to charitable uses by virtue of its original common-law powers, without claiming prerogative powers or invoking the aid of St. 43 Eliz.—*Chambers v. City of St. Louis*, 29 Mo. 543.

A municipal corporation may be compelled in equity to administer and execute a valid charitable trust imposed upon it.—*Id.*

**Sup. 1876.** A testator gave to a beneficiary a specified sum, to be applied to a specific purpose which he had explained to the ben-

efficiary. He also gave to the same beneficiary an additional sum for another and specific charitable purpose, which the beneficiary understood; and the balance of the property the testator gave to the same beneficiary to apply in charity according to the beneficiary's best discretion. The beneficiary was appointed executor of the will. *Held*, that the executor took the bequests clothed with a trust to carry out objects not defined or expressed in the will, and a court cannot carry them out.—*Schmucker's Estate v. Reel*, 61 Mo. 592.

**Sup. 1886.** The courts of this state have jurisdiction over all subjects of charities and charitable devises and bequests, and such jurisdiction is not dependent upon St. 43, Eliz. c. 4; for it is now conceded that courts of chancery had an inherent jurisdiction over charities before the enactment of that statute.—*Howe v. Wilson*, 3 S.W. 390, 91 Mo. 45, 60 Am. Rep. 226.

**Sup. 1890.** It is the duty of an attorney general or circuit attorney, under Rev. St. 1879, § 984, to institute proceedings by quo warranto against the Widows' and Orphans' Home Society of Missouri, incorporated under Act March 19, 1866 (Sess. Acts 1866, p. 69), for misappropriation of its funds, on written complaint made to him on the affidavit of any credible person, showing reasonable cause to institute such proceedings, and members of the corporation and contributors to the fund have no right to call on a court of equity to exercise its powers for relief in such case, independent of the state, and, in face of the refusal of its representative, on their mere request and representation of the facts, to lend his countenance to the proceeding, in which he is made a part defendant.—*Tyree v. Bingham*, 13 S.W. 952, 100 Mo. 451.

**Sup. 1899.** A charitable trust will be recognized, protected, and enforced by the courts of chancery, without the aid of St. 43 Eliz. c. 4.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

**Sup. 1911.** Where a will creates a public charitable trust, and vests the title to the property and power of management and control in trustees, a court of chancery may, at the instance of the Attorney General, on behalf of the people, or at the instance of some other proper party, protect the trust, and remove or suspend unfaithful trustees, but orders made, on its own motion, for the appointment of auditors with powers of visitation are in excess of jurisdiction.—*State ex rel. Heddens v. Rusk*, 139 S.W. 199, 236 Mo. 201.

In a suit to construe the powers conferred on trustees by a will creating a public charitable trust, and to empower the trustees to borrow money with which to successfully maintain the trust, a provision in the decree that, during the existence of the indebtedness authorized, the trustees shall report to the court annually the financial condition of the trust, the amount of indebtedness paid, and the prospect of the institution maintained by the trustees, is outside of the issues, and does not justify the court on its own motion to appoint a board of auditors with duties of visitation.—*Id.*

**Sup. 1915.** Where a will gives a trustee power to decide as to details in the discharge of the trust, court cannot substitute its own discretion for that of the trustee, until he is guilty of misconduct, or the trust becomes impossible of execution, or is about to fail.—*Sandusky v. Sandusky*, 177 S.W. 390, 265 Mo. 219.

**Sup. 1916.** Court will appoint trustee and administer trust, on donor's failure to do so, if court can determine his intent.—*Buckley v. Monck*, 187 S.W. 31. See Charities, Ⓒ47 in this Digest.

#### Ⓒ44. Visitation.

*See explanation, page iii.*

#### Ⓒ45. Rights, duties, and liabilities of charitable societies and trustees.

##### Ⓒ45 (1). In general.

**App. 1881.** Discontinuance of functions of charitable society. See *Soldiers' Orphans' Home v. Wolff*, 10 Mo. App. 596, memorandum.

##### Ⓒ45 (2). Liability for torts.

**Sup. 1869.** The city of St. Louis is not liable for the negligence and misfeasance of the officers and servants of the city hospital; their duties being of a public and charitable nature.—*Murtaugh v. City of St. Louis*, 44 Mo. 479.

**Sup. 1908.** The Employés' Hospital Association of the Frisco Line, a corporation under the direct control of the St. Louis & San Francisco Railway Company, which undertakes to furnish medical treatment to employés of said railroad in consideration of monthly payments made by them, is not a "charitable institution," within the rule which exempts such institutions from liability for negligence.—*Phillips v. St. Louis & S. F. R. Co.*, 111 S.W. 109, 211 Mo. 419, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742.

**Sup. 1920.** In an action for personal injuries, the charitable character of the defendant hospital clearly appearing from its articles of association, wherein its work is expressly referred to as Christian charity work, was for the court to pass upon, and not for the jury.—*Nicholas v. Evangelical Deaconess Home and Hospital*, 219 S.W. 643, 281 Mo. 182.

A charitable hospital is not liable in damages to a pay patient for injuries suffered when nurse, a servant of the hospital, gave carbolic acid, instead of alcohol, for a rub; the doctrine of respondeat superior not applying in such cases.—*Id.*

Where charitable character of corporate hospital was established, a pay patient, who paid for all services and supplies, cannot recover for negligence of the hospital's employes; the charitable character of the institution protecting it.—*Id.*

**App. 1903.** A railroad's relief department, supported by sums of money deducted from the wages of employes, and intended for the benefit of the employes who became sick or injured while in the company's service, but the benefits of which such employes are not entitled to receive except on condition of relieving the company from liability for negligence in causing the injury, is not a charity so as to relieve the department from negligence in selecting a physician to treat an injured employe who was a member of such department.—*Haggerty v. St. Louis, K. & N. W. R. Co.*, 74 S.W. 456, 100 Mo. App. 424.

**App. 1907.** A private, or quasi private, charity is not liable for negligence of its employes, or for its own negligence in selecting employes.—*Adams v. University Hospital*, 99 S.W. 453, 122 Mo. App. 675.

**App. 1900.** A charitable institution, public or private, is not liable for its torts, though the person injured is its employe.—*Whittaker v. St. Luke's Hospital*, 117 S.W. 1189, 137 Mo. App. 116.

#### 46. Officers and agents of charitable societies.

**App. 1897.** Although the act concerning the St. Louis House of Refuge, approved February 24, 1873, fails to prescribe and define the duties of the superintendent, the name of the office itself indicates a superintending control and direction of the affairs of the institution.—*State ex rel. Bristol v. Walbridge*, 69 Mo. App. 657.

#### 47. Judicial appointment of trustees.

**Sup. 1916.** A charitable trust being lawful and sufficiently specific and definite to enable the court to execute it, it will name a trustee; the will having failed to do so.—*Buckley v. Monck*, 187 S.W. 31.

If the use is so expressed in a charitable trust that the court may judge of the donor's motive so as to give specific effect to his general directions, he failing to name a trustee, the court will appoint one and administer the trust.—*Id.*

**Sup. 1919.** Where a charitable trust has been created, it will not be permitted to fail because a trustee has been erroneously or uncertainly designated, but the court in the exercise of its inherent equity, jurisdiction will appoint one.—*Robinson v. Crutcher*, 209 S. W. 104, 277 Mo. 1.

**Sup. 1927.** Equity will appoint trustee if necessary to prevent failure of charitable bequest because trustee named is incapable of taking or nonexistent.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A. L. R. 877, certiorari denied *Martin v. Ahrens*, 47 S. Ct. 591, 274 U. S. 745, 71 L. Ed. 1325.

#### 48. Administration and disposition of property or funds.

##### 48 (1). In general.

**Sup. 1906.** A decree authorizing a county court acting as trustee of a fund for the education of poor children within a certain district to cooperate with a public school district was not objectionable as authorizing the delegation of the trust to the school district.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

Where a testator made a bequest for the education of poor children under 16 years of age within a certain district, the application of the fund by co-operation with a public school district was not objectionable because it might incidentally lessen the burden of taxation upon the rich as well as the poor.—*Id.*

**Sup. 1911.** Where real property was devised to trustees to establish and maintain a cemetery, it was not essential that they should organize a cemetery corporation to carry out such purpose, although they were authorized to do so by Rev. St. 1909, § 3435.—*Stewart v. Coshow*, 142 S.W. 283, 238 Mo. 662.

##### 48 (2). Sale or lease of property.

**Sup. 1872.** After a devise of lands was made to a corporation for a charitable use,

unforeseen circumstances transpired which isolated a part of the lands and rendered them totally unfit for the purposes designed by the testatrix. The corporation had expended a large amount for improving the lands, and was in debt for a portion of the expenditures. *Held*, that a court of equity had power to order the sale of that part of the land which had become isolated, and to direct the application of the proceeds to the payment of the debt.—*Academy of the Visitation v. Clemens*, 50 Mo. 167.

**Sup. 1899.** When the court directs the alienation of property given by a testator to a charity, the alienation takes place, not by the trustees in the exercise of a power under the will, but by force of a decree of the court rendered in the exercise of its judicial power of administration in respect to charitable trusts.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

**Sup. 1913.** Where property was granted to trustees of two religious denominations with the provision that the trustees of neither could transfer their interest for other than church purposes, the trustees of the two churches cannot, by uniting, transfer the property for other than church purposes.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

In the absence of provisions to the contrary, a gift to charity is one in perpetuity, and it cannot be conveyed except for the purposes of charitable use; there being no reversion to the grantor or his heirs.—*Id.*

**Sup. 1920.** A decree ordering the sale of all the real estate of a charitable trust estate, and the reinvestment of the fund in high class bonds and securities, *held* erroneous, in view of evidence that the realty could not be sold for more than 50 per cent. of its value.—*City of St. Louis v. McAllister*, 218 S.W. 312, 281 Mo. 28.

The power of a court of equity to authorize the alienation of property belonging to a charitable trust should be exercised with caution, and one of the prerequisites to the exercise of such power is that it shall clearly appear that the proposed alienation is for the benefit of the charity.—*Id.*

**Sup. 1928.** Unsuccessful bidder at sale of properties of public charitable trust *held* unauthorized to sue to set aside sale.—*Dickey v. Volker*, 11 S.W.(2d) 278, certiorari denied 40 S. Ct. 252, 270 U. S. 839, 73 L. Ed. 986.

Managers and operators of properties of charitable trust *held* not disqualified from

purchasing such properties from trustees.—*Id.*

Facts alleged *held* not to show conspiracy between trustees and purchasers of properties of public charitable trust in suit to set aside sale.—*Id.*

Refusal of managers of properties of charitable trust to give information to bidder does not warrant setting aside sale by trustees.—*Id.*

Trustees' refusal to furnish information as to value of properties of charitable trust *held* not ground for setting aside sale of properties.—*Id.*

Failure of trustees of public charitable trust to have inventory of properties made and furnish copies to bidders does not warrant setting aside sale.—*Id.*

Trustees, selling properties of charitable trust, could refuse to give bidders information as to value of properties.—*Id.*

Refusal by trustees selling properties of charitable trust to furnish statement of earnings was within their discretion.—*Id.*

That properties of charitable trust were sold to operators and managers of properties does not warrant setting aside sale.—*Id.*

That trustees selling properties of charitable trust referred inquiries of bidders to operators of properties, who were also bidders, *held* not to warrant setting aside sale.—*Id.*

Unsuccessful bidder at sale of properties of public charitable trust, not requesting more time, cannot complain that insufficient notice was given.—*Id.*

Facts *held* not to show that unsuccessful bidders at sale of properties of charitable trust offered more than successful bidder.—*Id.*

Unsuccessful bidder at sale of properties of charitable trust, stipulating that bid was not to be divulged, cannot complain of trustees' refusal to disclose contents of bids.—*Id.*

Trustees selling properties of charitable trust were not required to consider details of bids they could not accept.—*Id.*

Courts cannot interfere with trustees' power to manage and sell property of charitable trust as authorized by testator, absent fraud, mismanagement, or incapacity.—*Id.*



Sale of properties of charitable trust will not be set aside, absent showing price is inadequate and resale would probably result in higher price.—Id.

Trustees selling properties of charitable trust have duty and discretion to pass on adequacy of security.—Id.

49. **Persons entitled to enforce charitable trust.**

**Sup. 1879.** The fact that, under Const. 1865, art. 1, § 12, a board of trustees is to transact the financial business of an ecclesiastical corporation, does not affect the rule that the corporation itself is the proper party to bring suit in the furtherance of its interests.—First Baptist Church v. Robberson, 71 Mo. 326.

**Sup. 1890.** Contributors to a charitable corporation, organized to provide a home for the orphans and widows of confederate soldiers from Missouri, not being peculiarly interested in, nor trustees of, the fund cannot maintain an action against the corporation and its officers for nonuser or misuser of the franchise.—Tyrce v. Bingham, 13 S.W. 952, 100 Mo. 451.

**Sup. 1928.** Attorney General has sole right to sue for mismanagement or misuse of funds of public charitable trust; individual members of public having no such right.—Dickey v. Volker, 11 S.W.(2d) 278, certiorari denied 49 S. Ct. 252, 279 U. S. 839, 73 L. Ed. 986.

Those with special interest may enforce public charitable trust, or localized charity may be enforced by class suit.—Id.

**App. 1910.** Under a will creating a trust fund for the purpose of building a chapel to be open to the free use of all "evangelical denominations" in the vicinity in which a chapel is to be erected, property owners in the vicinity have no such interest as will entitle them to sue to remove the trustee appointed by the will to carry out the trust because of his nonaction, as the beneficiaries are the denominations only.—Holman v. Renaud, 125 S.W. 843, 141 Mo. App. 399.

A trust created by will, which created a fund for the erection of a chapel for the free use of all the evangelical denominations in the vicinity in which it is to be erected, is not a public trust requiring suit to remove the trustee appointed in the will to carry out the trust to be brought by the Attorney General or prosecuting attorney, since there is no

serious difficulty in determining who the beneficiaries are.—Id.

50. **Actions for administration or enforcement.**

**Sup. 1879.** Where the petition in an action to construe a will distinctly alleges that plaintiff is the beneficiary intended, defendant cannot raise the question of the uncertainty of designation of such beneficiary in the will by demurring to the petition.—First Baptist Church v. Robberson, 71 Mo. 326.

**Sup. 1898.** A petition by a mere stranger to effectuate a charitable trust by the doctrine of cy-pres, praying that the petitioner be directed to take custody of the institution provided for, may be deemed an acceptance of a proper decree in response to the attorney general's answer, which directed plaintiff to take custody.—Women's Christian Ass'n v. Campbell, 48 S.W. 960, 147 Mo. 103.

A donation and investiture in a trustee of lands for charitable uses extinguishes all interest of the donor and his heirs, and hence they are not necessary parties to a suit to effectuate the trust by a sale of the property.—Id.

A decree directing the execution according to the cy-pres doctrine of a devise to a charitable trust is not vitiated by the fact that plaintiff was a stranger to the will, and had no interest in the devise, where the attorney general was made party defendant with interested parties, and answered, admitting the bill, and praying the same relief.—Id.

**Sup. 1899.** The heirs of a testator are not necessary parties to a suit by the trustees of a charitable trust praying for a decree relieving them from restraints upon their power to alienate the trust property imposed by the will, where the will operated as an immediate devise of the property to the trustees, as the heirs had no interest therein.—Lackland v. Walker, 52 S.W. 414, 151 Mo. 210.

Where the public is the beneficiary of a charitable trust, the attorney general is the only necessary party to a suit instituted by the trustees relating to their powers and duties.—Id.

**Sup. 1902.** On the hearing of a bill by a trustee for a decree authorizing it to divert the trust fund under the cy-pres doctrine, the court generally found all the issues against all the prayers of plaintiff's petition, but afterwards found specially that the relief prayed

might be advisable at some future time, and decreed that plaintiff be empowered to divert the trust fund as prayed at such future time as the court should deem advisable, and expressly "retained jurisdiction for the purpose of making further orders and decrees as might be proper." *Held*, that the decree was, in effect, a final judgment for defendant, without prejudice to the subsequent bringing of another suit; hence the attempted retention of jurisdiction was a nullity, conferring no power to make a subsequent order in the same cause.—*City of St. Louis v. Crow*, 71 S.W. 132, 171 Mo. 272.

**Sup. 1906.** A trust created by a bequest for the tuition and education of poor children under the age of 16 within a certain district is perpetual, and in no event can revert to the testator's heirs; and hence they are not necessary parties to a suit relating to the administration of the trust.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

**Sup. 1913.** An action under Rev. St. 1899, § 650, providing that a party in or out of possession may bring an action to determine his right and title to land, is not a proper action in which to determine the question of the right of the trustees of a charitable trust to sell the trust property and adjudicate the interest of the grantor's heirs.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

**Sup. 1915.** The heirs of a testatrix had no interest in a fund given in valid trust for

religious purposes, and were not necessary parties in a proceeding with reference to the proper application of the trust fund.—*Sandusky v. Sandusky*, 177 S.W. 390, 265 Mo. 219.

**Sup. 1928.** Attorney General *held* not improperly made party to church's action to quiet title to property bequeathed to it, though failure to join Attorney General as party would not have been error.—*Harger v. Barrett*, 5 S.W.(2d) 1100, 319 Mo. 633.

**App. 1902.** Where a part of a certificate of deposit was given to the trustees of a church as a charitable trust, one of the trustees who procured the money with which to pay the excess between the certificate and the amount of the gift to the donor, was not a necessary party to a suit to enforce the trust.—*Farmers' & Merchants' Bank v. Robinson*, 70 S.W. 372, 96 Mo. App. 385.

Where a donor, owning a certificate of deposit for \$3,282.14, indorsed an assignment of the entire certificate to the trustees of a church to which he desired to give \$3,000 of the amount, and at the same time executed an instrument creating a charitable trust of such \$3,000 in favor of the trustees, to be used for the benefit of the church, a court of equity, after the donor's death, had power to enforce the trust in a suit between the donor's executor and certain of his heirs and the donee to recover the amount of the certificate from the bank.—*Id.*

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Consult Pocket Part for later cases. For explanation, see page iii.

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